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Part IV

Federal Communications Commission

47 CFR Part 1

Implementation of Section 224 of the Act; A National Broadband Plan for Our Future; Proposed Rule

FEDERAL COMMUNICATIONS COMMISSION

47 CFR Part 1

[WC Docket No. 07–245, GN Docket No. 09–51; FCC 10–84]

Implementation of Section 224 of the Act; A National Broadband Plan for Our Future

AGENCY: Federal Communications Commission.

ACTION: Proposed rules.

SUMMARY: In this Further Notice of Proposed Rulemaking (FNPRM), the Commission proposes rules to expedite access by telecommunications carriers and cable operators to utility poles. Proposed measures include adoption of a specific timeline for poles survey and make-ready work, use of outside contractors, and improving the availability of data. The FNPRM also proposes to improve the pole attachments enforcement process, and proposes ways to make attachment rates as low and uniform as possible consistent with section 224 of the Communications Act. These steps should lower both the cost of gaining access to utility poles and pole attachment rates. These actions are intended to remove impediments to the deployment of facilities and to increase delivery of broadband services.

DATES: Comments are due on or before August 16, 2010 and reply comments are due on or before September 13, 2010. Written comments on the Paperwork Reduction Act proposed information collection requirements must be submitted by the public, Office of Management and Budget (OMB), and other interested parties on or before September 13, 2010.

ADDRESSES: You may submit comments, identified by WC Docket No. 07–245; GN Docket No. 09–51, by any of the following methods:

- *Federal eRulemaking Portal: http://www.regulations.gov*. Follow the instructions for submitting comments.
- *Federal Communications Commission's Web Site: http://fjallfoss.fcc.gov/ecfs2/*. Follow the instructions for submitting comments.
- *People with Disabilities:* Contact the FCC to request reasonable accommodations (accessible format documents, sign language interpreters, CART, *etc.*) by e-mail: *FCC504@fcc.gov* or phone: 202–418–0530 or TTY: 202–418–0432.

For detailed instructions for submitting comments and additional information on the rulemaking process, see the **SUPPLEMENTARY INFORMATION** section of this document.

In addition to filing comments with the Secretary, a copy of any comments on the Paperwork Reduction Act information collection requirements contained herein should be submitted to the Federal Communications Commission via e-mail to *PRA@fcc.gov* and to Nicholas A. Fraser, Office of Management and Budget, via e-mail to *Nicholas_A._Fraser@omb.eop.gov or via fax at 202–395–5167.*

FOR FURTHER INFORMATION CONTACT: Jonathan Reel, Wireline Competition Bureau, Competition Policy Division, 202–418–1580. For additional information concerning the Paperwork Reduction Act information collection requirements contained in this document, send an e-mail to *PRA@fcc.gov* or contact *Judith-B.Herman@fcc.gov.*

SUPPLEMENTARY INFORMATION: Pursuant to sections 1.415 and 1.419 of the Commission's rules, 47 CFR 1.415, 1.419, interested parties may file comments on or before August 16, 2010 and reply comments on or before September 13, 2010. Comments may be filed using: (1) The Commission's Electronic Comment Filing System (ECFS), (2) the Federal Government's eRulemaking Portal, or (3) by filing paper copies. *See Electronic Filing of Documents in Rulemaking Proceedings,* 63 FR 24121 (1998).

- *Electronic Filers:* Comments may be filed electronically using the Internet by accessing the ECFS: *http://fjallfoss.fcc.gov/ecfs2/* or the Federal eRulemaking Portal: *http://www.regulations.gov.*
- *Paper Filers:* Parties who choose to file by paper must file an original and four copies of each filing. If more than one docket or rulemaking number appears in the caption of this proceeding, filers must submit two additional copies for each additional docket or rulemaking number.

Filings can be sent by hand or messenger delivery, by commercial overnight courier, or by first-class or overnight U.S. Postal Service mail. All filings must be addressed to the Commission's Secretary, Office of the Secretary, Federal Communications Commission.

- All hand-delivered or messenger-delivered paper filings for the Commission's Secretary must be delivered to FCC Headquarters at 445 12th St., SW., Room TW–A325, Washington, DC 20554. All hand deliveries must be held together with rubber bands or fasteners. Any envelopes must be disposed of before entering the building.
- Commercial overnight mail (other than U.S. Postal Service Express Mail and Priority Mail) must be sent to 9300 East Hampton Drive, Capitol Heights, MD 20743.
- U.S. Postal Service first-class, Express, and Priority mail must be addressed to 445 12th Street, SW., Washington DC 20554.

People with Disabilities: To request materials in accessible formats for people with disabilities (braille, large print, electronic files, audio format), send an e-mail to *fcc504@fcc.gov* or call the Consumer & Governmental Affairs Bureau at 202–418–0530 (voice), 202–418–0432 (tty).

Filings and comments are also available for public inspection and copying during regular business hours at the FCC Reference Information Center, Portals II, 445 12th Street, SW., Room CY–A257, Washington, DC 20554. They may also be purchased from the Commission's duplicating contractor, Best Copy and Printing, Inc., Portals II, 445 12th Street, SW., Room CY–B402, Washington, DC 20554, telephone: (202) 488–5300, fax: (202) 488–5563, or via e-mail *http://www.bcpiweb.com*.

This document contains proposed information collection requirements. The Commission, as part of its continuing effort to reduce paperwork burdens, invites the general public and the Office of Management and Budget (OMB) to comment on the information collection requirements contained in this document, as required by the Paperwork Reduction Act of 1995, Public Law 104–13. Public and agency comments are due September 13, 2010.

Comments should address: (a) Whether the proposed collection of information is necessary for the proper performance of the functions of the Commission, including whether the information shall have practical utility; (b) the accuracy of the Commission's burden estimates; (c) ways to enhance the quality, utility, and clarity of the information collected; and (d) ways to minimize the burden of the collection of information on the respondents, including the use of automated collection techniques or other forms of information technology. In addition, pursuant to the Small Business Paperwork Relief Act of 2002, Public Law 107–198, see 44 U.S.C. 3506(c)(4), we seek specific comment on how we might further reduce the information collection burden for small business concerns with fewer than 25 employees.

OMB Control Number: 3060–XXXX.

Title: Pole attachment Access Requirements.

Form Number: N/A.

Type of Review: New collection.

Respondents: Business or other for-profit.

Number of Respondents and Responses: 2,961 respondents; 20,427 responses.

Estimated Time per Response: 6–300 hours.

Frequency of Response: On occasion and annual reporting and recordkeeping requirements and third party disclosure requirement.

Obligation to Respond: Mandatory.

Total Annual Burden: 965,202 hours.

Total Annual Cost: No cost.

Privacy Act Impact Assessment: No impacts.

Nature and Extent of Confidentiality: No need for confidentiality.

Needs and Uses: Delivery of telecommunications, information, and video services depends on the ability of wireline and wireless providers of these services to attach their facilities (*e.g.,* cable and fiber) to existing utility infrastructure. The Commission proposes a comprehensive regulatory scheme to ensure that the terms and conditions of attachment are just and reasonable under section 224 of the Communications Act. These proposals largely formalize existing practices, such as contract negotiations, applications to attach, surveys and engineering analyses, coordinated repositioning of existing attachments. But the proposals also impose some new paperwork requirements, including web postings of information, and letters of notification among the affected parties. Both existing practices and new proposals are incorporated in the paperwork burden estimates. Most of these responsibilities fall on the pole-owning utility, but some paperwork is required of prospective attaching entities. Normal course-of-business practices, including preparation, review, and payment of invoices, are not included.

Below is a synopsis of the Commission's Further Notice of Proposed Rulemaking in WC Docket No. 07–245, GN Docket No. 09–51, adopted May 20, 2010, and released May 20, 2010.

Synopsis of Further Notice of Proposed Rulemaking

1. In this FNPRM, the Commission seeks comment on how to improve access to essential infrastructure, and expedite the build-out of affordable broadband services as well as telecommunications and cable services. The Commission proposes a specific timeline for all wired pole attachment requests (including fiber or other wired attachments by wireless carriers), and seeks comment on the timeline and exceptions or refinements, as well as the development of a timeline for the attachment of wireless facilities. The Commission also proposes rules allowing the use of contract workers in certain circumstances, and proposes reforming its access dispute-resolution process consistent with the aims of the National Broadband Plan. The Commission seeks to establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with section 224 of the Act, and the Commission seeks comment on proposals to accomplish this goal.

A. Expediting Access to Utility Poles

2. *A Comprehensive Timeline for Section 224 Access.* The Commission proposes a comprehensive timeline for the make-ready process, as recommended in the National Broadband Plan. The Commission begins the process of establishing a Federal timeline that covers each step of the pole attachment process, from application to issuance of the final permit. The Commission believes that the Federal timeline should be comprehensive and applicable to all forms of communications attachments. The Commission proposes that it should adopt a timeline covering the process of certifying wireless equipment for attachment. The record before the Commission includes many examples of delay in make-ready work in states without make-ready timelines, in contrast to evidence of more expedited deployment in those states that have adopted timelines. Section 224 imposes a responsibility on utilities to provide just and reasonable access to any pole, duct, conduit, or right-of-way owned or controlled by it, in addition to preserving their ability to deliver their traditional services. The Commission is skeptical of the 'zero-sum' view that some commenters seem to take with respect to the resources devoted to pole attachments and regular maintenance. To the extent utilities or other commenters assert that they are unable to satisfy these requirements, commenters are asked to provide further detail. Are utilities unable to hire enough workers to perform timely surveys and make-ready, and to ramp up their operations to meet demand? Inasmuch as they are unable to perform pole attachments as needed without impeding their provision of electric service, why is this so? Are these issues really a claim of insufficient cost recovery, rather than inability to provide make-ready work in a timely fashion?

3. *A Proposed Five-Stage Timeline for Wired Pole Attachment.* The Commission proposes adopting a specific five-stage timeline to govern the pole attachment process for wired attachments consisting of the following five stages: (1) Survey; (2) estimate; (3) attacher acceptance; (4) performance; and, if needed, (5) multiparty coordination. Depending how long the applicant reviews the estimate, and whether the existing attachers complete their work in a timely manner, make-ready should be complete within a 105 to 149 day window after the utility receives a complete application for access. The Commission does not propose at this time to apply this timeline to make-ready for wireless equipment or pole replacement.

4. *Stage 1—Survey: 45 Days.* As current rules dictate, a request for access continues to trigger a 45 day period for the utility to respond. The Commission proposes that, as the first stage of the timeline, the Commission should retain existing Commission rule § 1.1403(b). A "request for access" is a complete application that provides the utility with the information necessary to begin to survey the poles. The current rule gives utilities 45 days to provide a written explanation of evidence and information for denying the request for reasons of lack of capacity, safety, reliability or engineering standards. The rule is functionally identical to a requirement for a survey and engineering analysis when applied to wired facilities, and is generally understood by utilities as such. The rule remains applicable to wireless facilities, but could apply in a somewhat different manner. A 45-day survey limit accords with the time allowed for surveys in New York, Connecticut, and the Coalition Proposal, as well as the current rule.

5. The Commission proposes that all requests for attachment be included in the timeframe for the survey stage, even where the request ultimately indicates a lack of capacity. Any right the owner has to refuse to install a new pole, and other questions about timing, however, do not affect the applicant's right to know whether the owner considers pole replacement necessary. The Commission seeks comment on whether to clarify what constitutes a sufficient request to trigger the timeline. Utilities state that application errors cause them to miss deadlines, and New York has adopted specific rules governing the application process. The Commission asks whether it should adopt similar regulations, or leave the details of the application process in the hands of individual parties. The Commission also

seeks comment on whether timing should be adjusted when an application that appears complete includes errors that delay the survey. Should significant errors justify stopping the clock? Should it matter whether the errors reflect lack of due care by the applicant, or lack of information that the utility could have provided?

6. *Stage 2—Estimate: 14 Days.* The Commission proposes that, as the second stage in the pole access timeline, a utility must tender an estimate of its charges to perform any make-ready work within 14 days after completing the survey. Both the New York timeline and the Coalition Proposal include a similar deadline, and the Commission proposes that such a timeframe is reasonable. Although utilities commonly provide an estimate with the survey and engineering analysis, an estimate of charges is not clearly required under the current 45-day response rule. The Commission proposes a deadline for estimates that is separate from the survey in order to permit a utility to separate the engineering analysis from its estimation of charges, and to permit the attacher time to examine and consider the engineering assessment before it reviews an invoice.

7. *Stage 3—Acceptance: 14 Days.* The Commission proposes that, as the third stage in the timeline, the applicant should have 14 days to accept the tendered estimate, consistent with New York's practice. The Commission considers it unreasonable to require a utility to commit indefinitely to its make-ready proposal and estimate of charges, and believes that imposing this time limit on prospective attachers will provide additional certainty. Limiting review also meets the intention that the timeline should be comprehensive, and address each phase of the process. The applicant may accept the estimate sooner, and need not wait 14 days before accepting or rejecting it.

8. *Stage 4—Performance: 45 Days.* The Commission proposes that, as the fourth stage in the timeline, payment by the applicant should trigger a 45-day period for the completion of make-ready work, consistent with the approach in New York and Connecticut. Given the experience in New York and Connecticut, the Commission finds 45 days to be a reasonable time period for the actual performance of make-ready work. To implement this approach, the Commission proposes that, when it receives payment, a utility must notify immediately all entities whose existing attachments may be affected by the project. The Commission further proposes that notification must include a reminder that those attachers have 45 days to move, rearrange, or remove any facilities as needed to perform the make-ready work and that, if they fail to do so, the utility or its agents, or the new attacher, using authorized contractors, may move or remove any facilities that impede performance. Moreover, the Commission proposes that the obligation to complete make-ready work in this timeframe extend not only to the utility, but also to existing attachers. Utilities contend that existing attachers cause delays and have little incentive to cooperate, especially if the applicant will be a competitor, and this constrains their ability to provide timely pole access to new attachers. The Commission seeks comment with regard to this assertion, as well as the incentive and ability of other attachers on a pole to discriminate against a new attacher. The Commission invites comment on alternative or additional policies that could ensure the cooperation needed as part of the make-ready process. By contrast, the Commission notes that the Coalition Proposal would not adopt a specific number of days for completion of relevant make-ready work, instead proposing to perform such work "in a manner that does not discriminate in favor of the utility's own needs or customer work." The Commission seeks comment on what metrics and data would be needed to evaluate compliance with such an approach, and how it would be reported or otherwise made available. The Commission also seeks comment on the balance reflected in the Coalition Proposal in this regard between attachers' interests in timely, predictable pole access and pole owners' interests in ensuring safety, reliability, and sound engineering.

9. *Stage 5—Multiparty Coordination: 30 Days.* The Commission proposes that the fifth stage of the timeline—if needed—will provide time for any coordination and make-ready work required in the event that some existing attachers fail to move their facilities as directed by the utility. The Commission notes that incumbent LECs typically occupy more space on a pole than other communications attachers and, due to their location on a pole, often must be the first to move their communications attachments as part of the make-ready process. And while current Commission rules provide that attachments by a cable operator or non-incumbent LEC telecommunications carrier may not be moved by the utility until 60 days have passed, that rule does not govern attachments by incumbent LECs. Thus, after 45 days, the utility or its agent may move incumbent LEC attachments as needed and, after 60 days, may act independently of other existing attachers to finish the project.

10. Consequently, it is reasonable to allow extra time for the utility or its agent to complete the make-ready with a free hand. Given that the utility will have surveyed the poles and coordinated rearrangement, and, after 60 days, may act independently of other existing attachers, the Commission considers 30 days after the 45th day a reasonable extension of time to undertake any coordination or planning required to finish the project. The Commission seeks comment on this proposal. In addition to defining a default timeline, the Commission recognizes the need to define certain exceptions or limitations in appropriate circumstances.

11. *Adjustments to the Timeline for the Number of Pole Attachment Requests.* In addition, the Commission recognizes the potential need to address utilities' concerns about possible operational or logistical challenges or the need to respond to factors outside their control. Thus, the Commission seeks comment on any necessary adjustments or exclusions from the timeline proposed above.

12. *Size of Request.* The Commission seeks comment on whether requests for access to a particularly large number of poles should be excepted from the timeline, or subject to an alternative timeline. Requests for access vary widely, and the Commission seeks comment on how best to incorporate the size or complexity of requests into the rules. Utah and Vermont adjust the duration of the survey and performance deadlines for both the size of the job and size of the utility. Utah divides requests for attachment into four categories: (1) Up to 20 poles; (2) 21 to 300 poles, or up to .5 percent of the owner's poles in Utah; (3) 300 to 3,000 poles, or 5 percent of the owner's poles in Utah, up to 3,000 poles; and (4) requests that exceed 3,000 poles or 5 percent of the owner's poles in Utah, which are negotiated individually. At each step, the lower outcome of the absolute number or percentage test applies. Vermont staggers the timeline solely according to the percentage of the owner's poles where attachment is requested, which it divides at .5 percent, 3 percent, and 5 percent; any request that exceeds 5% of the owner's poles must be negotiated individually. Similarly, New York requires applicants to give advance notice of "significant" attachment requests.

13. Comment is sought on the merits and effectiveness of the states' timeline adjustments or notice requirements as

modifications to the proposed Federal timeline described above. Utah and Vermont's approach has the virtue of calibrating the timeline to fit both the size of the request and the size of the utility, but implementation depends upon access to data that may not currently be readily available for utilities nationally. Should utilities below a certain size have the option of sorting attachment requests into categories determined by a percentage of the utility's in-State poles, and adjusting the timeline accordingly? If so, how should the Commission define a large, medium, and small request, and what timeframe would be appropriate for each level? Should small utilities negotiate all timelines individually? Alternatively, should the timeline apply to small utilities for requests up to a certain size, with any larger requests subject to individual negotiation?

14. Providing access on a rolling basis, or capping the number of attachments in a given time period, might provide an alternative approach to modifying the proposed timeline to accommodate larger jobs. The Coalition Proposal would limit any individual request to 250 poles, with pole access requests limited to 600 attachments in any one month. Utah considers a request to attach to more than 300 poles a large request, and counts all requests from any particular prospective attacher within a calendar month as one application. Regarding surveys, UTC reports that, on average, approximately 19 percent of all requests take longer than 45 days to process and, of that number, the reason for 30 percent of missed deadlines was the size of the project. Comment is sought regarding whether, and if so, how, the reasonable size of a request would fit the timeline that the Commission proposes. The Commission also asks whether that size should be adjusted for small utilities, and, if so, what thresholds are appropriate.

15. Just as some requests might prove too large for the timeline to accommodate, some attachers might seek faster action on smaller requests. Connecticut accelerates the deadline when an applicant requests access to four or fewer attachments. Utah distinguishes access requests for 20 poles or less. Should the Commission adopt an alternative timeline for small requests, and, if so, how many poles should count as a small request and what deadlines should apply? Commenters should consider whether some deadlines may be easier to scale back than others, and address the concern that a utility that can act quickly alone may not be able to induce other attachers to act quickly in concert. Section 224 requires that the utility give existing attachers a "reasonable opportunity" to modify their attachments. What notice would be appropriate in the context of particular small jobs?

16. *Stopping the Clock.* The Commission acknowledges that circumstances beyond a utility's control may require prioritization, or otherwise warrant interrupting the timeline. In New York, "circumstances beyond the owner's control, other than resource problems, will excuse meeting the timetable. Non-payment of charges will also stop the clock for meeting timetables." In Vermont, the clock stops for extraordinary circumstances or reasons beyond the pole owner's control. Comment is sought with regard to stopping and restarting the clock. Are guidelines necessary or helpful? What type of communication or notice between parties is expected? If so, what potential disputes would guidelines resolve, and should guidelines be specific or general? The Commission would expect the utility to return to the timeline as soon as circumstances permit, which will generally be the same point that the utility resumes normal operation, and to keep all interested parties reasonably informed.

17. *Wireless Attachment Timeline Issues.* The Commission also solicits comment on developing timelines for section 224 access other than wired pole attachments. First, the Commission seeks comment on whether the wired pole attachment timeline is appropriate for wireless equipment. Utilities assert that wireless attachment presents different safety, reliability, and engineering concerns because wireless equipment varies widely; is often placed in or near the electric lines; and requires a power source. The current rule requiring a response to pole access requests within 45 days applies in full to utilities that receive requests by wireless carriers, however. Where a utility has no master agreement with a carrier for wireless attachments requested, such as pole top attachments, the utility may satisfy the requirement to respond with a written explanation of its concerns with regard to capacity, safety, reliability, or engineering standards. The Commission seeks comment on whether it should require that the response be sufficiently detailed to serve as a basis for negotiating a master agreement, which would dictate a timely process for future attachments.

18. The Commission seeks comment on considerations that would affect a timeline tailored to suit requests for attachment of wireless equipment after a utility and the carrier have reached a master agreement. Attachment of wireless equipment may complicate engineering analyses, but may also avoid the multiparty notice and coordination issues that characterize rearrangement of wired facilities. Also, wireless carriers using a distributed antenna system (DAS) attach to relatively few poles compared to cable operators and wireline carriers that attach to every pole that their network passes. Should a timeline for requests for wireless equipment reflect these circumstances, and if so how? The Commission particularly asks utilities that have permitted wireless equipment to be installed on their poles to report their experience, and to describe their typical timeframes for meeting wireless attachment requests. The goal is to bring regularity and predictability to attachment of wireless facilities while acknowledging that the attachment of wireless telecommunications equipment in or near the electric space may raise different safety, reliability, and engineering concerns.

19. *Other Section 224 Timeline Issues.* Section 224 provides that, when an owner intends to modify a pole, the owner shall provide both written notification to "any entity that has obtained an attachment" and a "reasonable opportunity to add to or modify its existing attachment." The record suggests that modification may be required during make-ready when, for example, a pole that has been grandfathered to a prior standard must be brought into compliance with current standards when a new attachment is added. Similarly, a utility may have been unaware of a safety violation until make-ready is performed. Does the proposed timeline provide adequate time for utilities to implement this obligation? The definition of "pole attachment" in section 224(a)(4) includes attachments to a pole, duct, conduit, or right-of-way. The record compiled in this proceeding almost exclusively addresses issues of attachments to poles. Beyond timeline issues for access to poles, comment is sought on whether to implement this timeline for access to section 224 ducts, conduits, and rights-of-way owned or controlled by a utility. Has delayed access to infrastructure other than poles impeded the deployment of broadband or other services? If so, should the proposed pole attachment timeline set forth above be applied to requests for access to other infrastructure, or are modifications or other considerations needed?

20. *Use of Outside Contractors.* Attachers frequently seek the ability to

use independent contractors to deploy their facilities when the utility fails to perform survey and make-ready work in a timely manner. The National Broadband Plan recommends rules that allow attachers to use independent, utility-approved and certified contractors to perform engineering assessments and communications make-ready work, as well as independent surveys. In defining how and when attachers may employ contractors in response to that recommendation, the Commission first delineates between: (a) Survey and make-ready work; and (b) the actual attachment of facilities. As a general matter, the Commission believes it is appropriate to allow greater utility control over the former by permitting utilities to require the use of pre-approved contractors for this work, but continuing a less restrictive approach, originally established in 1996, for the latter. The Commission also distinguishes between electric utilities and incumbent LECs regarding the level of control that each may exercise over an attacher's use of independent contractors.

21. *Basic Right to Use Contractors.* The Local Competition Order established a general principle that attachers may rely upon independent contractors; that order did not differentiate between two different types of work: (a) Surveys and make-ready; and (b) post-make-ready attachment of lines. As a result, there have been ongoing disagreements regarding the ability of attachers to use contractors to perform survey and make-ready work under existing law. As discussed below, addressing these issues in greater detail here the Commission proposes to clarify and revise this approach in several respects in the context of surveys and make-ready to reflect utilities' concerns regarding safety, reliability, and sound engineering. The Commission also finds differing approaches warranted for incumbent LEC pole owners as compared to other pole owners.

22. In particular, with respect to surveys and communications make-ready work, the Commission proposes that: Attachers may use contractors to perform surveys and make-ready work if a utility has failed to perform its obligations within the timeline, or as otherwise agreed to by the utility. As discussed above, the Commission proposes a pole access timeline based in significant part on the approach taken in New York. Within that regulatory framework, the New York Commission gives utilities the option of using their own workers to do the requested work, or to hire outside contractors themselves, or to allow attachers to hire approved outside contractors. Under the proposed approach, utilities likewise would be entitled to rely on their own personnel unless they are unable to complete work within the timeline. If the utility decides to deploy its workforce on other projects or otherwise is unable to meet a deadline, the prospective attacher would be free to use contractors that are approved and certified by the utility. Comment is sought on this general approach, including the relative benefits of preserving greater control for utilities as compared to potential time- or cost-savings that attachers might obtain if they have appropriate contractors available and ready to do make-ready work.

23. With respect to actual attachment of facilities to poles, the Commission proposes to retain the existing rules. The make-ready process is designed to address the utilities' safety, reliability and engineering concerns prior to a new attachment. So when that process is complete and facilities are ready to be attached, the utility's concerns are less pressing, and an attacher's interest in rolling out properly permitted facilities is proportionately larger. Therefore, for the post-make-ready attachment of facilities, the Commission retains the existing standard of "same qualifications, in terms of training, as the utilities' own workers," and continues to deny utilities the right to predesignate or co-direct an attacher's chosen contractor. The Commission seeks comment on this proposal, as well as other alternatives.

24. *Approval and certification of contract workers.* With respect to electric utilities and other non-incumbent LEC pole owners, the Commission proposes that: To perform surveys or make-ready work attachers may use contractors that a utility has approved and certified for purposes of performing such work. This is consistent with the approach of the New York Commission—cited approvingly by some attachers—which entitles applicants for attachment to hire contractors from a utility-approved list if the utility cannot or will not meet survey and make-ready deadlines. A number of utilities express concern that the safety and reliability of their poles may be jeopardized by independent contractors. Crucial judgments about safety, capacity, and engineering are made during surveys and make-ready, and the Commission finds the utilities' concerns reasonable. Permitting such utilities to decide which contractors it will approve and certify for surveys and make-ready addresses the need that utilities maintain control over safety and engineering standards, although the Commission seeks comment on alternative approaches, as well.

25. Although the Commission proposes to allow electric utilities and other non-incumbent LEC pole owners to pre-approve the contractors they will permit to perform surveys and make-ready, their discretion should not be unbounded, and the Commission proposes the following requirements. First, the Commission proposes to require such utilities to post or otherwise share with attachers a list of approved- and certified contractors, including any contractors that the utility itself uses. Second, the Commission proposes to require each such utility to post or otherwise share with attachers the standards it uses to evaluate contractors for approval and certification and require the nondiscriminatory application of those standards. Under the proposal, these utilities may design their requirements as they see fit, by, for example, setting training standards, approving training manuals, or otherwise clarifying their requirements.

26. These requirements are minimally burdensome and are sufficient to prevent a utility from artificially limiting the list of approved contractors. The Commission is unpersuaded by contentions from certain utilities that the decisions on outside contractors will lead to resource diversion of non-employee "resources," undercutting their ability to deliver traditional services. Nothing in this proposal affects a utility's control of its employees. The Commission is aware of the need to balance the work of infrastructure personnel, but also mindful that section 224 imposes obligations on utilities that may require accommodations and adjustments. The Commission seeks further comment on the staffing issues, especially regarding the utilities' rights to the time and attention of contractors. The Commission invites comment concerning whether the proposed requirements are necessary, appropriate, and sufficient for their purpose.

27. The Commission seeks comment on this proposal, including whether it strikes the right balance of rights and burdens of attachers and utilities, and any implementation issues the Commission should address. For example, if no list is provided, or if one is not available when the application is filed, should the existing "same qualifications" standard apply by default? The Commission also seeks comment on whether any additional criteria are warranted. For example, should this list contain a minimum number of contractors to ensure ready

availability of contractors if make-ready work is needed? Should the list automatically include any contractors previously used by the utility for its own purposes? Should there be a presumption that contractors that are approved and certified by a utility (or multiple utilities) other than the pole owner be acceptable for make-ready work?

28. With respect to incumbent LECs, the Commission proposes that: to perform surveys or make-ready work attachers may use any contractor that has the "same qualifications, in terms of training, as the utilities own workers." As discussed above, in the Local Competition Order, the Commission reasoned that "[a]llowing a utility to dictate that only specific employees or contractors be used would impede the access that Congress sought to bestow on telecommunications providers and cable operators * * *." These risks are heightened in the context of incumbent LEC utility poles, where the new attacher typically will be a competitor of the incumbent LEC. Thus, the balancing of safety concerns and protection for attachers differs from the context of electric utility-owned poles, and leads us to propose an approach that grants greater flexibility to attachers.

29. *Direction and Supervision of Outside Contractors.* The Commission proposes that, for surveys and make-ready work, utilities and prospective attachers may jointly direct and supervise contractors. As with approval and certification of contract workers, the Commission proposes a differing approach for incumbent LEC pole owners and other pole owners. And in the context of actual attachment of facilities to poles, the Commission does not propose any affirmative right for utilities to jointly direct and supervise contractors.

30. For electric utilities and other non-incumbent LEC pole owners, the Commission proposes that: attachers performing surveys and make-ready work using contractors shall invite representatives of the utility to accompany the contract workers, and should mutually agree regarding the amount of notice to the utility. The Commission further proposes that, whenever possible, both parties' engineers should seek to find mutually satisfactory solutions to conflicting opinions, but when differences are irreconcilable, the pole owners' representative may exercise final authority to make all judgments that relate directly to insufficient capacity or safety, reliability, and sound engineering, subject to any otherwise-applicable dispute resolution process. The Commission sees no conflict between the use of contractors as outlined above and the electric utilities' safety and engineering concerns. Nor does the Commission see a conflict with the attachers' desire to use independent contractors. Use of contractors is an appropriate tool to facilitate timely deployment of facilities only when it does not circumvent or diminish the electric utilities' vital role in maintaining the safety, reliability, and sound engineering of the pole infrastructure.

31. In the case of incumbent LEC-owned poles: attachers performing surveys and make-ready work using contractors shall invite a representative of the incumbent LEC to accompany and observe the contractor, but the incumbent LEC shall not have final decision-making power. In the majority of cases, electric power companies and other non-incumbent LECs are typically disinterested parties with only the best interest of the infrastructure at heart; incumbent LECs may make no such claim. In contrast to the vast majority of electric utilities or similar pole owners, as discussed above, incumbent LECs are usually in direct competition with at least one of the new attacher's services, and the incumbent LEC may have strong incentives to frustrate and delay attachment. To allow an incumbent LEC a veto over contractors would provide them with an undue ability to act on that incentive. The Commission seeks comment on whether incumbent LECs have other legal responsibilities or obligations under joint use agreements that could counsel in favor of a different approach.

32. *Working Among the Electrical Lines.* The Commission further proposes that all utilities may deny access by contractors to work among the electric lines, except where the contractor has special communications-equipment related training or skills that the utility cannot duplicate. In so doing, the Commission clarifies that "proximity of electric lines" extends into the safety space between the communications and electrical wires but, not among the lines themselves. The Commission concluded in the Local Competition Order that "[a] utility may require that individuals who will work in the proximity of electric lines have the same qualifications, in terms of training, as the utility's own workers, but the party seeking access will be able to use any individual workers who meet these criteria." Safety, reliability, and engineering concerns are strongest regarding work among energized power lines, and the National Broadband Plan calls for the use of independent contractors to perform "engineering assessments and communications make-ready work." In any event, the word "proximity" is ambiguous, and could mean either "up to the electric lines" or "among the electric lines." The former is the more reasonable choice and the Commission believes it is appropriate to remove this ambiguity from the rules. Thus, the Commission proposes that, generally, attachers and their contractors may be limited to the communications space and safety space below the electric space on a pole. However, utilities must permit contract personnel with specialized communications-equipment training or skills that the utility cannot duplicate to work among the power lines, such as work with wireless antennae equipment. Because of the heightened safety considerations, any such work shall be performed in concert with the utility's workforce and when the utility deems it safe.

Other Options To Expedite Pole Access

33. *Payment for Make-ready Work.* In addition to adopting a formal pole access timeline, the Commission seeks to correctly align the incentives to perform make-ready work on schedule. Accordingly, the Commission proposes to adopt the Utah rule that applicants pay for make-ready work in stages, and may withhold a portion of the payment until the work is complete. In Utah, applicants trigger initiation of performance by paying one half the estimated cost; pay one quarter of the estimated cost midway through performance; and pay the remainder upon completion. What schedule of payment is normal in comparable circumstances in other commercial contexts? Alternatively, should the Commission adopt a general rule permitting payment for make-ready work in stages, and leave the details of the specific payment schedule to negotiation?

34. *Schedule of Charges.* The Commission proposes that utilities shall make available to attaching entities a schedule of common make-ready charges. The National Broadband Plan recommended that the Commission "[e]stablish a schedule of charges for the most common categories of work (such as engineering assessments and pole construction)" as an additional way to lower the cost and increase the speed of the pole attachment process. Such a schedule could provide transparency to attachers seeking to deploy their networks and could fortify the "just and reasonable" access standard for pole attachments. The Commission seeks comment generally on the benefits and any limitations associated with

requiring utilities to prepare such a schedule. Further, the Commission asks whether and how schedules of common make-ready charges are used and implemented by utilities today. The Commission also seeks comment on any comparable State requirements. For example, the Commission notes that the New York Commission's rules require that make-ready charges be in each pole owner's operating agreement, be posted on its Web site, with supporting documentation available to attachers on request, and can only be changed annually with notice. The Commission also asks if there are other mechanisms currently in use, such as standardized contract terms, that provide the necessary information and transparency to the make-ready process, without additional government mandate. Finally, the Commission seeks comment on whether particular make-ready jobs and charges are the most common, and thus would most easily be applied to a generalized schedule of charges.

35. *Administering Pole Attachments.* The Commission seeks comment on ways to simplify the relationship between prospective attachers and utilities when there is joint ownership. The record suggests that, when a pole is jointly owned, a prospective attacher may sometimes be required to obtain permission to attach from both owners. Consolidating administrative authority in one managing utility would simplify a prospective attacher's request for access, and clarify which utility will interact with the requesting entity and existing attachers during the make-ready process. The Commission therefore proposes that, when more than one utility owns a pole, the owners must determine which of them is the managing utility for any jointly-owned pole. Also, requesting entities need only deal with the managing utility, and not both utilities. The Commission also proposes that both utilities should make publicly available the identity of the managing utility for any given pole, and the Commission seeks comments on these proposals. The Commission invites comment on whether the proposed regulations are sufficient to clarify joint owners' rights and responsibilities with regard to the right of access. In addition, the Commission seeks comment on joint use agreements, and whether they may inhibit the managing owner from administering the entire pole. If the joint user is an incumbent LEC, how should the Commission address concerns that it might not be inclined to devote its resources to providing access for a competitor? Do joint use agreements sometimes give that user a degree of "control" over access to the pole to the point that the user may have a specific duty to provide access under section 224?

36. The Commission also seeks comment regarding the managing utility's responsibility to administer the pole during the make-ready process. In particular, under section 224, an existing attacher may not be required to bear any of the costs of rearranging its attachment to make room for a new attacher. As a practical matter, only the utility has privity with both the requesting entity and the existing attachers, and it appears reasonable for the utility to manage the transfer of funds. The Commission is reluctant, however, to entrust this responsibility to the managing utility without standards or guidance. Therefore, it proposes to require the utility to collect from existing attachers statements of any costs that are attributable to rearrangement; to bill the new attacher for these costs, plus any expenses the utility incurs in its role as clearinghouse, and to disburse compensatory payment to the existing attachers. The Commission seeks comment on this proposal, and any alternatives for managing this process. The Commission also asks whether utilities require any further clarification of their role in managing the pole during the make-ready process. For example, should the managing utility schedule the sequence for attaching entities to move their facilities during make-ready?

37. *Attachment Techniques.* In the Order, the Commission clarified that the Act requires a utility to allow cable operators and telecommunications carriers to use the same pole attachment techniques that the utility itself uses or allows. Some commenters state, however, that even if a utility has employed such practices in the past, it should be able to prohibit boxing and bracketing for both itself and other attachers going forward. If a utility changes its practices over time to exclude attachment techniques such as boxing, to what extent would the nondiscrimination standard in the statute automatically address this, or are rules necessary? The Commission also seeks comment on how standards should apply when a pole is jointly used or owned, and on whether utilities' decisions regarding the use of boxing and bracketing should be made publicly available.

38. *Improving the Availability of Data.* The Commission seeks comment on how to improve the collection and availability of information regarding the location and availability of poles, ducts, conduits, and rights-of-way. As the National Broadband Plan points out, there are hundreds of entities that own and use this infrastructure, and accurate information about it is important for the efficient and timely deployment of advanced and competitive communications networks. Initially, the Commission asks what data would be beneficial to maintain, such as the ownership of, location of, and attachments on a pole. Should the Commission collect these data itself, or might industry, including third-party entities, be better suited for the task? If the latter, what is the appropriate role for the Commission regarding the establishment of common standards and oversight? Could or should this information, if collected and maintained by separate entities, be aggregated into a national database?

39. To gain perspective on the scope of this task, the Commission seeks comment on the number of poles for which data would need to be gathered, how long it would take to inventory them, and the cost of such an inventory. The Commission also asks what existing methods utilities currently use, such as the National Joint Utilities Notification System (NJUNS) or Alden Systems' Joint Use services. How can the Commission ensure participation by all relevant parties, including timely updates of information? For example, is it reasonable for a utility to require all attachers to actively use or populate a system it uses, such as NJUNS, to inventory pole attachments, perhaps as a term of the master agreement? How can the Commission ensure that the costs are shared equitably by pole owners and other users of the data? The Commission also seeks comment on the challenges to creating and maintaining such a database, including security issues, access for prospective attachers, and the potential burden to small utilities, as well as on any additional benefits such data would have for maintaining safe and reliable infrastructure.

40. The Commission also expects that the timeline and related rules proposed above will help expedite pole access, and proposes that it monitor whether those rules, if adopted, achieve the intended results. The Commission seeks comment on the most appropriate method for it to use in this regard. Would the other possible improvements to the collection and availability discussed above provide a source of such information? If not, should the Commission otherwise collect such information, either formally, or through a periodic Public Notice or Notice of Inquiry? Similarly, is there other

information that the Commission should collect to monitor the effectiveness of any other pole access, enforcement, or pricing rules it might adopt?

B. Improving the Enforcement Process

41. *Revising Pole Attachment Dispute Resolution Procedures.* In response to the Pole Attachment Notice, the Commission received several comments suggesting that the Commission modify its procedures for resolving pole attachment complaints. In addition, the National Broadband Plan included recommendations that the Commission implement institutional changes, such as the creation of specialized forums and processes for attachment disputes, and adopt process changes to expedite dispute resolution.

42. The Commission asks whether it should modify its existing procedural rules governing pole attachment complaints. Should the Commission adopt additional rules or procedures to address specific issues that arise with wireline or wireless attachments? Do any of the Commission's other procedural rules, such as the rules governing formal complaints under section 208 of the Act, or the rules governing complaints related to cable service, provide a suitable model in developing new procedural rules for pole attachment complaints? What other issues concerning dispute resolution processes should the Commission consider?

43. If the Commission were to establish specialized forums to handle pole attachment disputes, what form and structure should these forums take? Under what legal authority could the Commission authorize the formation of such forums? How would the forums be formed, managed, and funded? How should forum participants be selected? What specific expertise should staff of these forums have? What role should the Commission or Commission staff play with regard to the forums? What specific role should such forums play in the resolution of pole attachment disputes? Should the forums engage in mediation or other alternative dispute resolution mechanisms? Should the use of the forums for dispute resolution be mandatory or voluntary? Should these specialized forums issue decisions in specific cases? How could the decisions of the forums be challenged, and pursuant to what standard? Should such decisions be appealable to the Commission? What kinds of rules or procedures should govern the work of the specialized forums? How would the forum participants avoid conflicts of interest when engaging in dispute resolution processes with industry participants? Do the Transition Administrator procedures established in the 800 MHz Report and Order provide a suitable model in developing these forums? The Commission invites comment.

44. *Efficient Informal Dispute Resolution Process.* In the Pole Attachment Notice, the Commission noted that the Commission has encouraged parties to participate in staff-supervised, informal dispute resolution processes and that these processes have been successful in resolving pole attachment matters. If parties are able informally to agree to a resolution of their problems, they can avoid the time and expense attendant to formal litigation. Some attachment disputes may be more quickly or cost-effectively resolved by the companies involved themselves or through other local dispute resolution processes outside the Commission's auspices. The Commission seeks comment on whether the Commission should attempt to encourage this type of local dispute resolution with a set of "best practices," or in other ways. If the Commission were to develop a set of best practices, what would the likely impact be on the process compared with how disputes are resolved today? Should the best practices or local processes apply to all attachment disputes, safety and engineering issues only, or have some other scope? The New York Commission, for instance, requires some resolution at the company level before a formal complaint can be filed. Should the Commission encourage similar efforts, suggest that parties seek mediation or arbitration before filing a complaint, or are there other processes that parties have found helpful and can recommend? Are there other ways that the Commission should encourage this type of dispute resolution?

45. The Pole Attachment Notice questioned whether § 1.1404(m) has had the unintended consequence of discouraging informal resolution of disputes. For that reason, the Commission sought comment on whether the rule should be amended or eliminated. The Commission received no substantive comment concerning § 1.1404(m), which provides that potential attachers who are denied access to a pole, duct, or conduit must file a complaint "within 30 days of such denial." The experience of handling pole attachment complaints, however, leads us to believe that the rule hinders informal resolution of disputes. Specifically, the existence of the rule deters attachers from pursuing pre-complaint mediation and has prompted the premature filing of complaints. Indeed, several complainants have indicated to Commission staff that, although they would be interested in mediation, they felt they had no choice but to file a complaint first, because of § 1.1404(m). Thus, the Commission believes the rule unnecessarily pushes some parties into formal litigation at a stage when informal resolution still is possible. Accordingly, the Commission proposes that the 30-day requirement in § 1.1404(m) be eliminated.

46. *Remedies.* Under section 224 of the Act, the Commission is charged with a duty to "regulate the rates, terms, and conditions for pole attachments" and to "adopt procedures necessary and appropriate to hear and resolve complaints concerning such rates, terms, and conditions." The Commission has broad authority to "enforc[e] any determinations resulting from complaint procedures" and to "take such action as it deems appropriate and necessary, including issuing cease and desist orders * * *." In furtherance of these statutory duties, the Commission has adopted procedural rules governing complaints alleging both unreasonable rates, terms, and conditions for pole attachment, and the unlawful denial of pole access.

47. Section 1.1410 of the pole attachment rules lists the remedies available in a complaint proceeding where the Commission determines that a challenged rate, term, or condition is not just and reasonable. In such cases, the Commission may terminate the unjust and unreasonable rate, term, or condition, or substitute a just and reasonable rate, term, or condition established by the Commission. Moreover, § 1.1410(c) also permits a monetary award in the form of a "refund, or payment," which will "normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission from the date that the complaint, as acceptable, was filed, plus interest." Although the Commission occasionally has departed from the notion that the filing of a pole attachment complaint marks the beginning of a refund period, it usually has used the complaint filing date as the starting point for determining refunds.

48. The Commission's rules do not expressly set forth the remedies available where the Commission determines that a utility has wrongfully denied or delayed access to poles in violation of section 224(f) of the Act. In addition, the rules do not provide for an award of compensatory damages in cases where either an unlawful denial or

delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. The Commission proposes that § 1.1410 of the Commission's pole attachment complaint rules be amended to enumerate the remedies available to an attacher that proves a utility has unlawfully delayed or denied access to its poles. The Commission proposes that the rule specify that one remedy available for an unlawful denial or delay of access is a Commission order directing that access be granted within a specified time frame, and/or under specific rates, terms, and conditions. Because the Commission already has authority to issue such orders, and has done so in the past, this rule change would simply codify existing precedent.

49. The Commission further proposes amending § 1.1410 to specify that compensatory damages may be awarded where an unlawful denial or delay of access is established, or a rate, term, or condition is found to be unjust or unreasonable. Because the current rule provides no monetary remedy for a delay or denial of access, utilities have little disincentive to refrain from conduct that obstructs or delays access. Under the current rule, the only consequence a utility engaging in such conduct is likely to face in a complaint proceeding is a Commission order requiring the utility to provide the access it was obligated to grant in the first place. Currently, a utility that competes with the attacher may calculate that the cost of defending an access complaint before the Commission, even if it receives an adverse ruling, may be justified by the advantage the pole owner has gained by delaying a rival's build-out plans. Allowing an award of compensatory damages for unlawful delays or denials of access would provide an important disincentive to pole owners to obstruct access. It would also give the Commission the ability to ensure that the attacher is "made whole" for the delay it has suffered.

50. Should § 1.1410 be amended to provide for an award of compensatory damages where a rate, term, or condition is found to be unjust or unreasonable? Under the current rule, the only monetary remedy specified in such cases is a refund. Although the refund remedy may adequately compensate an attacher who has been charged excessive rental rates or make-ready fees, it does not compensate the attacher for unreasonable terms and conditions of attachment that do not involve payments to the pole owner. For example, a pole owner that unlawfully bars an attacher from using the boxing technique on poles may increase the charges an attacher must pay third parties to attach its facilities to poles. Just compensation in such a case would not involve a refund by the pole owner, but might require it to reimburse the attacher for costs the attacher would not have incurred but for the owner's unreasonable ban on boxing.

51. Finally, as noted above, § 1.1410(c) also permits a monetary award in the form of a "refund, or payment," measured "from the date that the complaint, as acceptable, was filed, plus interest." The Commission adopted § 1.1410(c) in 1978 to "avoid abuse and encourage early filing when rates are considered objectionable by the CATV operator." But the experience in handling pole attachment complaints leads us to believe that § 1.1410(c) fails to make injured attachers whole. Generally speaking, a plaintiff is entitled to recompense going back as far as the applicable statute of limitations allows. There does not appear to be a justification for treating pole attachment disputes differently. Moreover, the Commission finds that § 1.1410(c) discourages private negotiations between parties about the reasonableness of terms and conditions of attachment and instead encourages an attacher first to file a complaint and then to negotiate with the utility. For these reasons, the Commission proposes that § 1.1410(c) be modified by deleting the phrase "from the date that the complaint, as acceptable, was filed." Additionally, the Commission proposes that the phrase "consistent with the applicable statute of limitations" be added to emphasize that any relief sought is governed by the relevant limitations period.

52. *Unauthorized Attachments.* In the Pole Attachment Notice, the Commission sought comment on the prevalence of attachments installed on poles without a lawful agreement with the pole owner (so-called "unauthorized attachments"). In response, several utilities claim that a significant number of pole attachments on their poles are unauthorized and violate relevant safety codes. For example, Florida Power and Light reports finding 33,350 unauthorized attachments in an audit conducted in 2006. EEI and UTC maintain that, for some utilities, unauthorized attachments meet or exceed 30 percent of attachments. AEP submits the results of surveys conducted by five utilities indicating that unauthorized attachment rates in the double-digits are common. In contrast, other utilities report percentages that are significantly lower. For instance, Progress Energy, Xcel Energy, and Wheeling Power report unauthorized attachment rates of 6.18 percent, 4.79 percent, and 2 percent, respectively.

53. Attachers maintain that utilities' allegations of unauthorized attachments are "overblown." Time Warner Cable, for instance, contends that such assertions often are based on poor recordkeeping (including incorrect system maps), changes in pole ownership (*e.g.,* a utility considers a once-authorized attachment on a pole to be unauthorized after ownership is transferred to the utility), use of novel and inappropriate definitions of attachment that deviate from the parties' past practices and industry standards, and utilities' offering of financial incentives to their contractors to find unauthorized attachments. Other attachers are of a similar mind.

54. Based on the current record, the Commission is unable to gauge with certainty the extent of the problem of unauthorized attachments. Indeed, the data suggest that the number of unauthorized attachments can vary dramatically from one pole system to another. Nevertheless, the Commission believes the dangers presented by unauthorized attachments transcend the theoretical. True unauthorized attachments can compromise safety because they bypass even the most routine safeguards, such as verifying that the new attachment will not interfere with existing facilities, that adequate clearances are maintained, that the pole can safely bear the additional load, and that the attachment meets the appropriate safety requirements of the utility and the NESC. The question becomes, then, how best to address the problem of unauthorized attachments.

55. The Commission sought comment in the Pole Attachment Notice on whether existing enforcement mechanisms adequately address alleged unlawful practices by attachers and ensure the safety and reliability of critical electric infrastructure. Under current precedent, unauthorized attachment fees imposed by utilities are not "per se unreasonable," and the "penalty may exceed the annual pole attachment rate." A "reasonable penalty," however, cannot "exceed an amount approximately equal to the annual pole attachment fee for the number of years since the most recent inventory or five years, whichever is less, plus interest * * *."

56. Pole owners complain that this precedent results in penalties that are not steep enough to deter attachers from mounting facilities for which they have no permit or that fail to comply with relevant safety and engineering

standards. In one utility's words, the unauthorized attachment penalty approved by the Commission is "not a penalty at all in most cases," because the attacher ends up having to pay only what it would have owed had it followed appropriate permitting procedures in the first place. In contrast, some attachers insist that the current regime is sufficient, while others assert that allowing the imposition of penalties would contravene principles of contract law.

57. Although the Commission makes no specific findings today as to whether the Commission should allow stricter penalties for unauthorized attachments, it appears that penalties amounting to little more than back rent may not discourage non-compliance with authorization processes. In other words, competitive pressure to bring services to market may overwhelm the deterrent effect of modest penalties. And so the Commission seeks additional comment on practical and lawful means of increasing compliance through the use of more substantial penalties.

58. One potential alternative to the Commission's present penalty regime is a system akin to the one adopted by the Oregon Public Utilities Commission (Oregon Commission). The Oregon Commission specifies penalties of $500 per pole, per year, for attachment of facilities without an agreement, and, for attachments without a permit, $100 per pole plus five times the current annual rental fee per pole. The Oregon system further includes, among other things, a provision for attacher notification, opportunity for an attacher to correct violations or submit a plan for correction, and a mechanism for resolution of factual disputes. The Oregon penalties have been tested and refined with assistance from the Oregon Joint Use Association.

59. The Commission seeks comment on whether the system of penalties instituted by the Oregon Commission has been effective in reducing the incidence of unauthorized attachments in that State. What are the benefits and shortcomings of the Oregon system? Should the Commission adopt the Oregon standards as presumptively reasonable penalties for unauthorized attachments? Would the Commission need to modify the Oregon standards before adopting them as national standards? If so, in what ways? Should there be a threshold number of unauthorized attachments necessary before penalties apply? Should exceptions be made for violations caused or contributed to by the pole owner (*e.g.,* a utility that assumes ownership of a pole formerly owned by another entity, creates a hazard by adding facilities, changes its safety standards, renegotiates an attachment agreement, or otherwise causes a formerly permitted and safe attachment to lose that status)?

60. How could the Oregon standards be enforced—through provisions in pole attachment agreements, through the complaint resolution mechanism in section 224 of the Act, or through both? Would changes to the Commission's pole attachment rules (47 CFR 1.1401–1.1418) be necessary to enable utilities to bring unauthorized attachment complaints?

61. If the Oregon system is not adopted, what are alternative penalty systems that would deter unauthorized attachments? Are there other models the Commission should consider? What are the contours of such alternatives, including notice to attachers, safe harbors, opportunities for correction, exceptions for safety violations caused/contributed to by pole owners, and means of dispute resolution?

62. *The "Sign and Sue" Rule.* Under current Commission rules and precedent, an attacher may execute a pole attachment agreement with a utility, and then later file a complaint challenging the lawfulness of a provision of that agreement. This process, sometimes called "the sign and sue rule," allows an attacher to seek relief where it claims that a utility has coerced it to accept unreasonable or discriminatory contract terms to gain access to utility poles. In the Pole Attachment Notice, the Commission sought comment on the "sign and sue" rule, and asked whether the Commission should adopt some contours to the rule, such as time-frames for raising written concerns about a provision of a pole attachment agreement. As discussed below, the Commission proposes that the sign and sue "rule" should be retained, but also proposes that it be modified through an amendment to the Commission's rules that would require an attacher to provide a pole owner with notice, during contract negotiations, of the terms it considers unreasonable or discriminatory.

63. In response to the Pole Attachment Notice, a number of attachers filed comments supporting retention of the sign and sue rule in its present form. The attachers assert that, because utilities have inherently superior bargaining power in negotiating pole attachment agreements, attachers may be forced to accept unreasonable rates, terms, and conditions in order to gain the prompt access to poles that is vital to their business plans. One commenter observes that "cable operators or telecom providers may need to sign an unreasonable pole attachment agreement while they are undergoing time-sensitive build-outs or plant upgrades and cannot afford to be delayed by protracted negotiations or litigation before the Commission." The Commission's willingness to review the reasonableness of contract provisions, in the view of some attachers, has served to check the utilities' abuse of their superior bargaining and encourage them to negotiate in good faith, thus reducing the incidence of disputes.

64. Attachers oppose amending the Commission's rules to impose time limits on the right to challenge the provisions in a pole attachment agreement. They argue that such time limits are inappropriate because a given term in a pole attachment agreement may not be unreasonable on its face, but may only become so through a utility's later interpretation or application. They predict that imposing time limits on challenges to the reasonableness of terms would lead to unnecessary pole attachment litigation because attachers would be forced immediately to challenge terms that may, hypothetically, be unreasonably applied or interpreted in the future.

65. Several utilities filed comments opposing the sign and sue rule and suggesting that it be modified or eliminated. They contend that the rule has engendered distrust between pole-owning utilities and attaching entities. According to these utilities, attachers are willing to sign virtually any pole attachment agreement as a matter of expediency, knowing they can use the Commission's complaint process "to forestall or upset the utility's ability to enforce the agreement." The Commission's willingness to entertain pole attachment complaints at any time, they argue, undermines a pole owner's confidence "that it will realize the bargain it has struck with an attaching entity." As one commenter put it, the sign and sue rule "allows attachers to 'cherry pick' contractual provisions that they would like to disavow, while not extending the same privilege to utilities."

66. Utilities have proposed a number of fixes to these perceived problems with the sign and sue rule. One commenter urged the Commission to adopt a presumption that an executed pole attachment agreement is just and reasonable. Similarly, another commenter asked the Commission to make explicit that both parties to a pole attachment agreement are subject to a duty to negotiate in good faith, and bar

complaints as to the reasonableness of executed pole attachment agreements, absent extrinsic evidence of coercion or undue influence as would be sufficient to make the agreement void or voidable under the common law. Another utility asked the Commission to require that any challenges to pole attachment agreements be brought in State court under well-defined State law standards of unconscionability.

67. The Commission adopted the sign and sue rule in recognition that utilities have monopoly power over pole access. The Commission was concerned that a utility could nullify the statutory rights of a cable system or a telecommunications carrier by making "take it or leave it demand[s]" that it relinquish valuable rights under section 224 "without any *quid pro quo* other than the ability to attach its wires on unreasonable or discriminatory terms." The record does not demonstrate that the potential for utilities to exert such coercive pressure in pole attachment agreement negotiations is less significant today than when the Commission first adopted the sign and sue rule. Because there remains a real possibility that utilities may abuse their monopoly power during the negotiating process, the Commission proposes that the sign and sue rule should be retained in some form. For similar reasons, the Commission proposes that the record does not support adoption of a presumption that executed pole attachment agreements are just and reasonable.

68. To be sure, utilities have raised valid concerns about the need to ensure that both parties to a pole attachment agreement negotiate in good faith. Their suggestion, however, that the Commission's review of pole attachment agreements be limited to determining whether the agreement would be deemed unconscionable or voidable under State contract law appears inconsistent with the Commission's statutory mandate under section 224. Section 224 grants cable systems and telecommunications carriers rights to pole access, and to reasonable rates, terms, and conditions for pole attachment, that are independent and distinct from rights granted under contract law. The Commission has a duty under section 224 to "adopt procedures necessary and appropriate to hear and resolve complaints concerning * * * rates, terms, and conditions" of pole attachment pursuant to the requirements of section 224. The Commission would not be fulfilling that duty if it were to substitute the requirements of contract law for the dictates of section 224.

69. It is important to note, however, that section 224 does not grant attachers an unfettered right to "cherry pick" contractual terms they wish to disavow, while retaining the benefits of more favorable terms. An attacher is entitled to relief under the sign and sue rule only if it can show that a rate, term, or condition is unlawful under section 224, not merely unfavorable to the attacher. Further, the Commission has recognized that in some circumstances, a utility "may give a valuable concession in exchange for the provision the attacher subsequently challenges as unreasonable." Where such a *quid pro quo* is established, the Commission will not disturb the bargained-for package of provisions.

70. As the Commission has previously stated, the Commission encourages, supports and fully expects that mutually beneficial exchanges will take place between the utility and the attaching entity. The Commission wants to promote efforts by attachers and utilities to negotiate innovative and mutually beneficial solutions to contested contract issues. In furtherance of that goal, the Commission proposes that the Commission amend § 1.1404(d) of the rules to add a requirement that an attacher provide a utility with written notice of objections to a provision in a proposed pole attachment agreement, during contract negotiations, as a prerequisite for later bringing a complaint challenging that provision.

71. Should the amended rule include an exception addressing attachers' concerns that a given contract provision may not be unreasonable on its face, but only become so through a utility's later interpretation or application? The Commission thus proposes to include language in amended § 1.1404(d) allowing the attacher to challenge the lawfulness of a rate, term, or condition in an executed agreement, without prior notice to the utility during contract negotiations, where the attacher establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as later applied by the utility, and the attacher could not reasonably have anticipated that the utility would apply the challenged rate, term, or condition in such an unjust and unreasonable manner. The Commission believes that this amendment to § 1.1404(d) will prevent utilities from being blind-sided by an attacher's post-execution challenge to the lawfulness of contract provisions, and will encourage the parties to reach mutually acceptable compromises on disputed terms, before the agreement is executed.

72. Finally, the Commission asks for comment on when an attacher's cause of action challenging a rate, term, or condition in a pole attachment agreement accrues for purposes of applying the appropriate statute of limitations. The Commission proposes that the cause of action be deemed to accrue at the time the challenged contract provision is first applied against the attacher in an unlawful manner—regardless of whether the provision is facially invalid—because that is the point in time when the attacher suffers an injury. By contrast, if the cause of action were instead deemed to accrue at the time the agreement was executed, attachers might feel compelled to bring a complaint challenging a contract provision that may never be applied against them, merely to avoid having their claims extinguished by the statute of limitations. The Commission seeks comment on this proposed rule of accrual. Further, with respect to other claims involving pole attachments, the Commission seeks comment on whether the Commission should continue to follow common law principles in determining the time of accrual, or adopt other, alternative approaches.

C. Pole Rental Rates

73. Telecommunications carriers and cable operators generally pay for access to utility poles in two separate ways. First, as noted above, attachers pay nonrecurring charges to cover the costs of "make-ready" work—that is, rearranging existing pole attachments or installing new poles as needed to enable the provider to attach to the pole. Second, attachers generally also pay an annual pole rental fee, which currently is designed to recover a portion of the utility's operating and capital costs attributable to the pole. Both of these costs can impact communications service providers' investment decisions. In a prior section, this FNPRM seeks comment on ways to reduce make-ready costs. Below, the Commission seeks comment on ways to minimize the distortionary effects arising from the differences in current pole rental rates, consistent with the objectives of the National Broadband Plan and the existing statutory framework.

74. By virtue of the 1996 Act revisions, section 224 of the Act now sets forth two separate formulas to determine the maximum rates for pole attachments—one applies to pole attachments used by providers of telecommunications services (the telecom rate formula), and the other to pole attachments used "solely to provide cable service" (the cable rate formula).

As the Commission has implemented these statutory formulas, the telecom rate formula generally results in higher pole rental rates than the cable rate formula. The difference between the two formulas under current Commission rules is the manner in which they allocate the costs associated with the unusable portion of the pole—that is, the space on the pole that cannot be used for attachments. The cable rate formula and the telecom rate formula both allocate the costs of usable space on a pole based on the fraction of the usable space that an attachment occupies. Under the cable rate formula, the costs of unusable space on a pole are allocated in the same way, i.e., based on the portion of usable space an attachment occupies. Under the telecom rate formula, however, two-thirds of the costs of the unusable space is allocated equally among the number of attachers, including the owner, and the remaining one third of these costs is allocated solely to the pole owner.

75. At the same time that the Commission adopted a rule implementing the telecom rate formula, it addressed the issues of cable attachments used to offer commingled cable and Internet access services. In particular, the Commission held that cable television systems that offer commingled cable and Internet access service should continue to pay the cable rate. In 2000, the Supreme Court upheld this decision, finding that section 224(b) gives the Commission authority to adopt just and reasonable rates for attachments within the general scope of section 224 of the Act, but outside the "self-described scope" of the telecom rate formula or cable rate formula as specified under sections 224(d) and (e).

76. *Effects of Current Pole Rental Rates.* The National Broadband Plan recommends that the Commission "establish rental rates for pole attachments that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment." In particular, the Plan observes that "[a]pplying different rates based on whether the attacher is classified as a 'cable' or a 'telecommunications' company distorts attachers' deployment decisions." There have been many disputes about the applicability of "cable" or "telecommunications" rates to broadband, voice over Internet protocol and wireless services, among others. The Plan found that "[t]his uncertainty may be deterring broadband providers that pay lower pole rates from extending their networks or adding capabilities (such as high-capacity links to wireless towers)," based on the risk that, by doing so, a higher pole rental rate might be applied for their entire network.

77. The record here likewise bears out these concerns. A number of cable operators confirm that they have been deterred from offering new, advanced services, such as to anchor institutions or wireless towers, based on the possible financial impact if, as a result, they were required to pay the current telecom rate for all their poles. The National Broadband Plan estimated an average annual difference between the telecom rate and cable rate of approximately $3 today. Although that difference in rates might not seem significant in isolation, it could amount to approximately $90 million to $120 million annually, given the estimated 30–40 million poles subject to Commission-regulated rates used by the cable industry. Cable commenters estimate an even greater difference between the two rates of $208 million to $672 million for the cable industry as a whole. Moreover, the Commission anticipated that rate differences could deter cable operators from offering new services when it applied the cable rate to cable operators' attachments used for both video and Internet services, concluding that: In specifying [the cable] rate, the Commission intends to encourage cable operators to make Internet services available to their customers. The Commission believes that specifying a higher rate might deter an operator from providing non-traditional services. Such a result would not serve the public interest. Rather, the Commission believes that specifying the [cable rate] will encourage greater competition in the provision of Internet service and greater benefits to consumers.

78. Previously, the Pole Attachment Notice sought comment on, among other things, the difference in pole attachment rates paid by cable systems, incumbent LECs, and competing telecommunications carriers that provide the same or similar services. The Commission likewise recognized "the importance of promoting broadband deployment and the importance of technological neutrality," and thus "tentatively conclude[d] that all categories of providers should pay the same pole attachment rate for all attachments used for broadband Internet access service." The Pole Attachment Notice went on to tentatively conclude, however, that "the [uniform] rate should be higher than the current cable rate, yet no greater than the telecommunications rate."

79. The Commission declines to pursue the approach proposed by the Pole Attachment Notice for several reasons. The Commission believes that pursuing uniformity by increasing cable operators' pole rental rates—potentially up to the level yielded by the current telecom formula—would come at the cost of increased broadband prices and reduced incentives for deployment. Instead, by seeking to limit the distortions present in the current pole rental rates by reinterpreting the telecom rate to a lower level consistent with the Act, the Commission expects to increase the availability of, and competition for, advanced services to anchor institutions and as middle-mile inputs to wireless services and other broadband services.

80. *USTelecom and AT&T/Verizon Broadband Rate Proposals.* As an initial matter, the Commission seeks comment on two alternatives, filed after the comment cycle closed in the Pole Attachment Notice, to establish a uniform rate for all pole attachments used to provide broadband Internet access services, including those by telecommunications carriers. As described below, both the USTelecom and AT&T/Verizon proposals would allocate costs among attachers differently than they are allocated today based on different assumptions about numbers of attachers and the space each occupies on a pole. Presently, under the cable rate formula, attachers (other than a pole owner) pay an average of 7.4 percent of the annual costs of a pole. Under the current telecom rate formula, each attacher (other than a pole owner), pays an average of 11.2 percent of the annual costs of a pole in urban areas and 16.89 percent in non-urban areas. Under USTelecom's rate proposal, by contrast, any attacher (other than a pole owner) would pay 11 percent of the annual cost of a pole, regardless of the number of attachers or amount of space each attacher uses. Under the AT&T/Verizon proposal, it appears that each attacher (other than the pole owner) would pay 18.67 percent of the annual costs of the pole.

81. Both rate proposals consist of formulas that are different from those prescribed in section 224 of the Act. USTelecom and AT&T/Verizon argue that the Commission "is not limited to the particular rate formulas incorporating factors such as usable space set forth in [s]ection 224(d) and (e) for pole attachments of non-incumbent telecommunications carriers and cable television systems." Thus, USTelecom asserts that the Commission "has broad authority, within the bounds of reasonableness, 'to derive its own view of just and reasonable rates' * * * regardless of conventional considerations such as usable space."

The Commission seeks comment on this view of the Commission's authority. Although the Supreme Court has confirmed that the Commission can rely on its general section 224(b) authority to ensure "just and reasonable rates" to regulate pole rental rates, under that holding the Commission would appear to be bound by the statutory rate formulas within their "self-described scope." To the extent that Congress intended a particular rate formula to apply only when a provider was exclusively providing a particular type of service, it clearly knew how to do so. Thus, the statute provides that the section 224(d) cable rate formula applies to "any pole attachment used by a cable television system solely to provide cable service." The section 224(e) telecom rate formula is not limited in this manner, and thus the "self-described scope" of that formula would seem to encompass any attachments by telecommunications carriers so long as they are being used to provide telecommunications services—whether exclusively or in combination with other services. However, the Commission seeks comment on whether alternative interpretations of the statute would be reasonable. Alternatively, is there a way in which the USTelecom or AT&T/Verizon proposals could be reconciled with the pole rental rate formulas specified in sections 224(d) and (e) of the Act?

82. The Commission also seeks comment on whether the USTelecom or AT&T/Verizon proposals are in the public interest. In particular, the Commission notes that, under the USTelecom proposal, the rates paid by telecom attachers generally would be lower than those rates are today, but the rates paid by cable attachers would be higher. With respect to the AT&T/Verizon proposal, the Commission notes that it appears that both telecommunications carriers and cable operators generally would pay higher pole rental rates than yielded by the current telecom rate formula. While those outcomes would provide uniformity of rates, would they undermine investment incentives or otherwise increase the cost of or reduce competition for communications services?

83. *Reinterpreting the Telecom Rate.* Rather than deviating from the statutory telecom rate formula, the Commission seeks comment on ways to reinterpret the section 224(e) telecom rate formula so as to yield pole rental rates that reduce disputes and investment disincentives which can arise from the disparate rates yielded by the Commission's current rules. As the National Broadband Plan recognizes, this disparity largely results from the existing statutory framework, as implemented by the Commission. Although the National Broadband Plan recommended that Congress "consider amending [s]ection 224 of the Act to establish a harmonized access policy for all poles, ducts, conduits and rights-of-way," it also recommended that the Commission take what actions it can to address these rate disparities within the existing statutory framework. The Commission seeks comment below on alternatives for reinterpreting the telecom rate formula, the proposal based in part on one of those alternatives, as well as other alternative approaches to reinterpreting the telecom rate formula within the existing statutory framework.

84. *TWTC Proposal.* TWTC submitted a proposal to revise the interpretation of the telecom rate formula to "eliminate or dramatically reduce the differential in pole attachment rates." The Commission sought comment on this proposal in the Pole Attachment Notice in the context of the somewhat different focus and proposals considered there. The Commission revisits this proposal in light of the pole rate recommendation of the National Broadband Plan. In addition to the specific comment sought below, the Commission asks commenters to refresh the record regarding the questions raised about the TWTC proposal in the Pole Attachment Notice in the context of the issues under consideration here.

85. Specifically, TWTC asserts that, despite the textual differences between section 224(d) and section 224(e) regarding the costs to be included in the cable rate formula and the telecom rate formula, "the FCC currently includes the same cost categories in its implementing regulations" reflected in the two formulas. In particular, TWTC contends that the telecom rate includes costs not mentioned in section 224(e), citing: (1) Rate of return; (2) depreciation; and (3) taxes. TWTC alleges that such costs "bear no relation" to the cost of providing space for an attachment and are not necessitated by the language of section 224(e). In particular, TWTC contends that "none of these 'costs' has anything to do with actually providing 'space' on a pole for pole attachments because a utility would incur these costs 'regardless of the presence of pole attachments.'" Thus, TWTC proposes that those costs should be eliminated from the telecom rate.

86. TWTC suggests instead that utilities should determine "how much extra a utility must incur to provide non-usable and usable space on poles for pole attachments (in both construction and maintenance costs) and then fully allocate those costs based on the cost-apportionment formulas under Section 224(e)(2) and (3)." The underlying economic or analytical theory for TWTC's proposal is not entirely clear, however.

87. To the extent that TWTC is arguing for "costs" to be defined as marginal or incremental costs for purposes of section 224(e), the Commission is skeptical of that theory. Marginal cost can be defined either as the rate of change in total cost when output changes by an infinitesimal unit or as the change in total cost when output changes by a single unit. The term incremental cost refers to a discrete change in total cost when output changes by any non-infinitesimal amount, which might range from a single unit to a large increment representing a firm's entire output. The Eleventh Circuit, in addressing a takings challenge, has held that a pole attachment rate above marginal cost can provide just compensation, and marginal or incremental cost pricing can be an appropriate approach to setting regulated rates. Indeed, section 224(d) establishes such an approach as the low end of permissible rates under the cable rate formula. However, the section 224(e) formulas allocate the relevant costs in such a way that simply defining "cost" as equal to incremental cost would result in pole rental rates below incremental cost. In particular, section 224(e) allocates portions of the relevant "cost" to both the pole owner and the attachers. Thus, if the Commission precisely calculated the relevant incremental costs, and then applied the section 224(e) cost allocation formulas, the resulting pole rental rate would recover less than the utility's incremental cost, effectively resulting in a subsidy to the attacher. In other words, the pole owner would bear more costs than if there were no third party attachments on the pole at all. The Commission thus believes that defining the "cost of providing space" as incremental cost in the manner TWTC seems to suggest would be inconsistent with the section 224(e) framework, given the manner in which the statutory provision allocates the relevant "costs." Nevertheless, the Commission seeks comment on whether any party believes that, to the contrary, such an interpretation is permissible.

88. The Commission also seeks comment on whether there are other rationales that, consistent with the existing statutory framework, could support TWTC's proposed approach, possibly in a modified form. For example, what standard could the

Commission use to determine whether particular costs 'bear any relation' to the cost of providing space on a pole within the meaning of TWTC's proposal? To what extent would such an approach be consistent with the section 224 framework? As a practical matter, how would the particular costs be calculated, and what sources of data could be used to implement TWTC's proposal? In this regard, the Commission believes that the proposal below draws on some of the underlying elements of TWTC's proposal, but is more consistent with the statutory framework and readily administrable. However, the Commission also seeks comment on other possible approaches as well, to the extent that they have advantages over that proposal.

89. *Commission Rate Proposal.* The Commission proposes an alternative approach which would recognize that the Commission has substantial—but not unlimited—discretion under the statutory framework to interpret the term "cost" for purposes of section 224(e). This proposal would view the range of possible interpretations of "cost" under section 224(e) as yielding a range of permissible rates, from the current application of the telecom rate formula at the higher end of the range, to an alternative application of the telecom rate formula based on cost causation principles at the lower end. Under this approach, the Commission would select a particular rate from within that range as the appropriate telecom rate.

90. *Interpretation of the Statutory Framework.* The existing statutory framework consists of several key provisions, and any revised telecom rate formula must be consistent with those provisions. For one, section 224(b) imposes an over-arching duty that the Commission ensure that rates are "just and reasonable." As the Commission has recognized, "[r]ather than insisting upon a single regulatory method for determining whether rates are just and reasonable, courts and other Federal agencies with rate authority similar to the own evaluate whether an established regulatory scheme produces rates that fall within a "zone of reasonableness." For rates to fall within the zone of reasonableness, the agency rate order must undertake a 'reasonable balancing' of the 'investor interest in maintaining financial integrity and access to capital markets and the consumer interest in being charged non-exploitative rates.' " With respect to each of the alternatives for interpreting the telecom rate formula discussed below, as well as any others raised by commenters, the Commission seeks comment on how well the proposal ensures "just and reasonable" rates. In particular, the Commission seeks comment from pole owners, in addition to attachers and other interested persons. The Commission notes that pole owners' perspective regarding the costs and other characteristics of their infrastructure might give them unique insight into ways the Commission could reinterpret the section 224(e) telecom rate formula to yield pole rental rates "that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act], to promote broadband deployment."

91. In addition, sections 224(d) and (e) specify cable and telecom rate formulas. As discussed above, the Commission's rate rules already take account of one difference between those frameworks—namely, the treatment of unusable space. Other differences in those statutory provisions are not currently reflected in the Commission's rules, however. Although section 224(e) specifies how the pole space costs are to be allocated between the owner and attacher, it does not specify a cost methodology. In particular, section 224(e) describes how "[a] utility shall apportion the cost of providing space" on a pole—whether usable or unusable—but does not define "the cost of providing space." This is in contrast with the upper bound for the cable rate under section 224(d), which does identify particular costs to be included. The Commission initially implemented section 224(e) by interpreting "cost" to include the same cost categories that it was using in the cable rate formula, relying on a fully-distributed cost approach. This initial approach was not inherently unreasonable, as noted above, but it has resulted in rate disparities and disputes over which formula applies and impacted communications service providers' investment decisions.

92. This statutory framework bounds the ways in which the Commission can interpret and apply the telecom rate formula in section 224(e). The Commission agrees with commenters that the Commission has discretion to reinterpret the ambiguous term "cost" in section 224(e) and modify the cost methodology underlying the telecom rate formula to yield a different rate. Depending upon the relative magnitude of costs included, the telecom rate formula will yield relatively higher or lower rates. Identifying the upper- and lower-bound interpretations of "cost" that are consistent with the statute thus provides an upper and lower limit on the possible telecom rates that would be consistent with section 224(e). Any of the resulting rates within that range potentially could be adopted by the Commission as the "just and reasonable" rate for purposes of section 224(e).

93. *Upper Bound Rate.* To begin identifying the range of reasonable rates that could result from the telecom rate formula, the Commission first identifies the present telecom rate as a reasonable upper bound. The Commission's current telecom rate formula is based on a fully distributed cost methodology, which recovers costs that the pole owner incurs regardless of the presence of attachments. It includes a full range of costs, some of which, as TWTC argues, do not directly relate to or vary with the presence of pole attachments. For this reason, this interpretation of the statutory telecom rate formula could be considered at the higher end of the range of reasonable rates. In light of the National Broadband Plan's recommendation that the Commission seeks to achieve pole rental rates "that are as low and close to uniform as possible, consistent with [s]ection 224 of the [Act]," under this alternative the Commission ultimately would select a rate closer to the lower end of the range. Thus, within the context of this alternative, the Commission does not believe it is necessary to define the high end of the range more precisely, although the Commission seeks comment on that conclusion. The Commission also seeks comment on whether there is a cost methodology, other than a fully-distributed cost methodology, that could be considered as part of an upper-bound formula in addition, or instead.

94. *Lower Bound Rate.* In identifying the lower bound of reasonable rates under section 224(e), the Commission proposes that a rate that covers the pole owners' incremental cost associated with attachment would, in principle, provide a reasonable lower limit. For the reasons described above in the context of TWTC's proposal, however, to remain consistent with the statutory framework, this outcome cannot be achieved simply by defining costs as a precise calculation of incremental cost. Thus, the statutory framework makes it more difficult to identify a lower-bound rate that recovers a utility's marginal costs. Instead, some definition of "costs" somewhat above incremental cost would need to be used so that when those costs are allocated pursuant to the 224(e) formula, the resulting pole rental rate would allow the utility to recover the incremental cost associated with attachment.

95. For purposes of identifying such a lower-bound rate, the Commission continues to rely on the basic principles

of cost causation that would underlie a marginal cost rate. Under cost causation principles, if a customer is causally responsible for the incurrence of a cost, then that customer, the cost causer, pays a rate that covers this cost. This is consistent with the Commission's existing approach in the make-ready context where, for example, a pole owner recovers the entire capital cost of a new pole through make-ready charges from the new attacher when a new pole is needed to enable the attachment. Under this proposed approach, cost causation principles could be applied separately to each category of a pole owner's costs—broadly consisting of capital and operating costs—for purposes of the pole rental rate, as well.

96. The Commission recognizes that, under traditional ratemaking principles, rates may recover both operating expenses and capital costs, including a rate of return. Under the proposal, however, capital costs would be excluded for purposes of identifying a lower bound for the telecom pole rental rate. As an initial matter, the Commission notes that if capital costs arise from the make-ready process, the existing rules are designed to require attachers to bear the entire amount of those costs. With respect to other capital costs, the Commission believes it is likely that the attacher is the "cost causer" for, at most, a de minimis portion of these costs. It is likely that most, if not all, of the past investment in an existing pole would have been incurred regardless of the demand for attachments other than the owner's attachments. As a result, under a cost causation theory, where there is space available on a pole, an attacher would be required to pay for none, or at most a de minimis portion, of the capital costs of that pole. Given Congress' intention that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates, this alternative would simply exclude capital costs from the pole rental rate rather than perform a detailed cost analysis to identify the likely de minimis, if any, capital costs to include in the lower bound telecom rate. This is consistent with TWTC's argument, discussed above, that section 224(e) does not require the inclusion of these costs.

97. The Commission seeks comment on whether the exclusion of capital costs from the lower bound telecom rate under this approach is consistent both with principles of cost causation and the existing section 224 framework. To the extent that pole owners contend that they do, in fact, incur significant capital costs outside the make-ready context solely to accommodate third party attachers, the Commission seeks comment on the nature and extent of those costs. For example, the Coalition of Concerned Utilities argues that: (a) Communications attachers are responsible for incremental capital costs for the extra space on taller poles; and (b) those costs exceed the attachers' share of the capital costs for an entire pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas. In particular, the Coalition argues that utilities install taller poles routinely throughout their networks to satisfy their own needs and anticipated third-party attachment demand, and that they do not receive sufficient compensation for this option. For the reasons discussed above, the Commission questions how frequently such situations would arise. The Commission nevertheless invites parties to submit studies that isolate and quantify the effect of third-party attachment demand on pole height and therefore pole investment.

98. In addition, under the proposal, taxes would be treated as part of the capital costs that are excluded from the lower-bound telecom rate, based on cost-causation principles. The Commission seeks comment on the proposal to treat taxes as capital costs. The Commission also seeks comment more generally regarding the availability of space on poles today and in the future.

99. By contrast, this approach would continue to include certain operating expenses—namely maintenance and administrative expenses—in the definition of "cost" for purposes of the lower bound telecom rate formula. This is generally consistent with cost causation principles because it is likely that an attacher is causally responsible for some of the ongoing maintenance and administrative expenses relating to use of the pole. Although the attacher might not be the cost causer with respect to all the operating costs that would be included in the lower bound telecom rate under this approach, as noted above, Congress' intention was that the Commission not "embark upon a large-scale ratemaking proceeding in each case brought before it, or by general order" to establish pole rental rates, which the Commission believes counsels in favor of including the costs in the context of maintenance and administrative expenses. The Commission seeks comment on the reasonableness of including these operating costs, as well as the mechanics of such an approach. Is it appropriate to develop average per pole maintenance and administrative expenses from ARMIS or FERC 1 data and to allocate these per pole expenses between the owner and the attacher using the factors in section 224(e)? Would such an approach over- or under-allocate these expenses relative to the amount actually caused by the attacher? The Commission notes that the Coalition of Concerned Utilities argues that the incremental operating costs for attachments, which utilities contend are caused by communications attachers, exceed the attachers' share of the operating costs for a pole that the attachers bear under the fully distributed cost methodology reflected in the Commission's existing rate formulas. The Commission is skeptical of this claim because the Commission would expect that a significant portion of the pole-related maintenance and administrative expenses would be incurred for routine activities unrelated to the number of attachments. The Commission nevertheless invites parties to submit studies that isolate and quantify the effect of third-party attachment demand on operating expenses.

100. The Commission seeks comment on alternative proposals for determining a lower bound telecom rate. For example, should the Commission instead require a more precise identification of the costs to be included under such an approach? If so, would this be consistent with Congress' goal that the Commission's rate formulas be administrable? Commenters advocating such an approach should provide data calculating these costs consistent with their proposals, and identify how such data could be obtained for purposes of implementing their recommended alternative.

101. *Specific Rate Proposal.* Having proposed upper- and lower-bound telecom rates, the Commission considers the particular rate within that range that utilities may charge as the "just and reasonable" telecom rate. The Commission notes that it appears likely that, in most cases, the rates yielded by the current cable rate formula would fall within that range. The Commission seeks comment on whether these findings hold for pole attachments more generally. How likely is it that the cable rate will be higher than the telecom rate calculated using only maintenance and administrative expenses?

102. In particular, under this proposal, utilities would calculate the low-end telecom rate and the rate yielded by the current cable formula, and charge whichever is higher. Significantly, the cable rate formula has

been upheld by the courts as just, reasonable, and fully compensatory, and would result in greater rate parity between telecommunications and cable attachers. This approach would seem to further goals of the Act—to promote communications competition and the deployment of "advanced telecommunications capability." Moreover, as commenters point out, to the extent that attachers are, to the greatest extent possible, paying the same rates, this should minimize disputes that have resulted from the Commission's current rate formulas. This proposed alternative also appears to be readily administrable, consistent with Congress' instruction to develop a regulatory framework that may be applied in a "simple and expeditious" manner with "a minimum of staff, paperwork and procedures consistent with fair and efficient regulation." The Commission seeks comment on whether this proposal is consistent with other Commission policies, as well as whether it is consistent with the statutory mandate of section 224 to ensure "just and reasonable" pole rental rates, consistent with the statutory formulas.

103. *Other Alternatives and Overarching Considerations.* In addition to the specific alternatives for reinterpreting the telecom rate formula discussed above, the Commission seeks comment on any other possible approaches, including any approaches used by states that regulate pole attachments that commenters would recommend. For the approaches to reinterpreting the telecom rate formula discussed above, or other approaches identified by commenters, the Commission seeks comment on whether the proposal would be consistent with the Commission's obligations under the Act and whether it would further the public interest. How administrable is the proposed approach? To what extent would the proposed telecom rate be compensatory, and, when considered in conjunction with other revenues earned by the utility, would it both lead to adequate cost recovery and protect against double-recovery? Is the proposed approach consistent with the Commission's current rules governing make-ready charges—the other way in which attachers compensate pole owners for access to poles today? If not, how would the Commission's approach to make-ready payments need to be modified? Would it be possible for the Commission to forbear from applying the section 224(e) telecom rate, and adopt a different rate—such as the cable rate—pursuant to section 224(b), as some commenters have suggested?

104. *Incumbent LEC Rate Issues.* As part of their proposals discussed above, AT&T/Verizon and USTelecom assert that incumbent LECs should be subject to the just and reasonable rates provision in section 224(b) in the same manner as it applies to other providers. The issues related to incumbent LEC attachment rates, however, raise complex questions, and although the National Broadband Plan noted the possible effects of these rate disparities, the Plan did not include a recommendation specifically addressing this matter. As with the TWTC proposal discussed above, the Commission sought comment on the possibility of regulating the rates incumbent LECs pay for attachments in the Pole Attachment Notice in the context of the issues under consideration there. In contrast to the rate regulation proposals discussed above, the Commission does not propose specific rules in this FNPRM that would alter the Commission's current approach to the regulation of pole attachments by incumbent LECs. Rather, given the statutory and policy complexities, the Commission revisits the issue of regulation of rates paid by incumbent LEC attachers both in light of the specific telecom rate proposals, as well as the factual findings of the National Broadband Plan. In addition to the questions below, commenters should refresh the record regarding the questions raised regarding regulation of rates paid by incumbent LECs in the Pole Attachment Notice in the context of the issues under consideration here.

105. As an initial matter, the Commission seeks comment on the relationship between incumbent LEC pole attachments rates and deployment of broadband networks and affordability of broadband services. USTelecom asserts that pole attachment rates "can disproportionately affect the cost of delivering broadband in [rural] areas because the typically longer loops in rural areas often require more pole attachments per end user." Windstream, for example, argues that "[g]iven the importance of pole attachments in deploying advanced networks to rural consumers, any Commission action that reduces excessive pole attachment rates would promote, rather than stifle, a competitive marketplace for advanced communications networks," including broadband. Windstream thus urges the Commission to extend a lower uniform attachment rate that it may adopt to incumbent LECs because it relies heavily on pole attachments to deploy broadband service to rural consumers. Do commenters agree that uniform rates between incumbent LECs and other providers are necessary or helpful to promote broadband deployment in unserved or underserved areas of the country?

106. The Commission also seeks comment on the relationship between the pole rental rates paid by incumbent LECs and any other rights and responsibilities they have by virtue of their pole access agreements with utilities. For instance, incumbent LECs generally asserted in response to the Pole Attachment Notice that they presently are forced to pay rates for pole attachments that are unreasonably higher than those available to other attachers and that they need the protection of just and reasonable rates under section 224 to preclude being placed at a competitive disadvantage. Unlike other attachers, however, incumbent LECs generally attach to poles pursuant to joint use or joint ownership agreements. These arrangements between incumbent LECs and electric companies historically provide more favorable terms and conditions to attaching incumbent LECs than competitive LECs and cable operators receive from electric companies under license agreements. Electric utilities, cable operators, and competitive LECs thus argue that incumbent LECs have negotiated terms and conditions that give them advantages over cable operators and competitive LECs and, therefore, reducing attachment rates for incumbent LECs or allowing them to pay the same rate would provide them with an unfair competitive advantage. The Commission seeks further comment on how to reconcile these assessments and how the Commission should best pursue competitively neutral policies in these circumstances.

107. To the extent that section 224(b)'s "just and reasonable" rate regulation could apply to attachments by incumbent LECs, how would those rates be regulated to ensure that they are "just and reasonable," and how might they affect joint use or joint ownership agreements? Should the rate be the same as other attachers pay, notwithstanding the possible differences in pole access and utilization, as discussed above? And how should any approach be implemented? For instance, AT&T argues that, if incumbent LECs are entitled to attachments at regulated "just and reasonable" rates under section 224, any rate assessed by an electric company in excess of the statutory maximum rate should be unenforceable "because it would, by definition, be unjust and unreasonable" even if contained in an existing joint use agreement.

108. NCTA proposes an alternative plan whereby any attaching entity, including incumbent LECs, would be permitted to "opt in" to existing pole agreements. Under this proposal, each pole owner would make each pole attachment, joint ownership, or joint use agreement publicly available, and attachers could opt in to those agreements, accepting all the terms and conditions of the agreement. NCTA presumes "that pole owners will not be harmed by allowing third parties to attach to their poles at rates, terms, and conditions that the pole owner already has made available to at least one other attaching party in its service area." NCTA anticipates that "many ILECs may be reluctant to give up the favorable attachment rights that they typically possess under most joint use agreements," but provides them an alternative in cases where they believe a pole owner's rates are unreasonable. The Commission seeks input on the viability of these approaches, or other possible approaches. Could a remedy providing the ability for incumbent LECs unilaterally to opt out of joint use or joint ownership agreements in certain circumstances affect more than rate issues, such as safety and emergency response obligations, or negate other benefits that other utilities realize through joint use agreements? To what extent would any approach be readily administrable?

109. In addition to requesting the right to pay a uniform rate for pole attachments, incumbent LECs also generally assert that they should have "the same right as competitive LECs, wireless providers, and cable television systems to file complaints before the Commission to enforce their right to reasonable pole attachment rates, terms, and conditions for poles in which they lack an ownership interest." Some incumbent LECs assert they are left without any or sufficient recourse if electric utilities impose unreasonable rates, terms, and conditions and that this conflicts with the Commission's goals of promoting competition and broadband deployment. Electric utilities argue that incumbent LECs may seek recourse at the State level if they believe rates are unreasonable. The Commission seeks comment on what remedies incumbent LECs presently have to challenge any rates, terms, and conditions for pole attachments. Are those remedies sufficient? How, if at all, would the ability to file complaints with the Commission affect any State or local laws governing dispute resolution?

Procedural Matters

A. Paperwork Reduction Act Analysis

110. This document contains new information collection requirements subject to the Paperwork Reduction Act of 1995 (PRA), Public Law 104–13. It will be submitted to the Office of Management and Budget (OMB) for review under section 3507(d) of the PRA. OMB, the general public, and other Federal agencies are invited to comment on the new or modified information collection requirements adopted in this Order.

B. Regulatory Flexibility Analysis

111. As required by the Regulatory Flexibility Act of 1980, as amended, the Commission has prepared an Initial Regulatory Flexibility Analysis (IRFA) for this further notice of proposed rulemaking, of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this further notice of proposed rulemaking. The IRFA is in Appendix C. Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the further notice of proposed rulemaking. The Commission will send a copy of the notice of proposed rulemaking, including this IRFA, to the Chief Counsel for Advocacy of the SBA. In addition, the notice of proposed rulemaking and IRFA (or summaries thereof) will be published in the **Federal Register**.

C. Ex Parte Presentations

112. This proceeding shall be treated as a "permit-but-disclose" proceeding in accordance with the Commission's ex parte rules. Persons making oral ex parte presentations are reminded that memoranda summarizing the presentations must contain summaries of the substance of the presentations and not merely a listing of the subjects discussed. More than a one or two sentence description of the views and arguments presented is generally required. Other requirements pertaining to oral and written presentations are set forth in § 1.1206(b) of the Commission's rules.

D. Initial Regulatory Flexibility Analysis

113. As required by the Regulatory Flexibility Act of 1980, as amended (RFA), the Commission has prepared this present Initial Regulatory Flexibility Analysis (IRFA) of the possible significant economic impact on a substantial number of small entities by the policies and rules proposed in this Further Notice of Proposed Rulemaking (FNPRM). Written public comments are requested on this IRFA. Comments must be identified as responses to the IRFA and must be filed by the deadlines for comments on the FNPRM provided on the first page of the FNPRM. The Commission will send a copy of the FNPRM, including this IRFA, to the Chief Counsel for Advocacy of the Small Business Administration (SBA). In addition, the FNPRM and IRFA (or summaries thereof) will be published in the **Federal Register**.

1. Need for, and Objectives of, the Proposed Rules

114. The FNPRM seeks comment on a variety of issues relating to implementation of section 224 pole attachment rules in light of increasing intermodal competition since the Commission began to implement the 1996 Act. Specifically, the FNPRM seeks comment on the adoption of a specific timeline regarding the pole attachment request, survey, and make-ready time period in order to provide greater certainty for the timely deployment of telecommunications, cable, and broadband services. Additionally, the FNPRM seeks comment on the adoption of several proposals regarding the ability of new attachers to use contractors to perform pole attachment make-ready work. The FNPRM also proposes improvements to the existing enforcement process. Finally, the FNPRM seeks comment on existing rules governing pole attachment rates for telecommunications carriers and incumbent local exchange carriers (LECs) in pursuit of a low, compensatory rate that will improve incentives for network deployment.

2. Legal Basis

115. The legal basis for any action that may be taken pursuant to the FNPRM is contained in sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 224, 251(b)(4), 303.

3. Description and Estimate of the Number of Small Entities to Which the Proposed Rules May Apply

116. The RFA directs agencies to provide a description of, and where feasible, an estimate of the number of small entities that may be affected by the proposed rules and policies, if adopted. The RFA generally defines the term "small entity" as having the same meaning as the terms "small business," "small organization," and "small governmental jurisdiction." In addition, the term "small business" has the same meaning as the term "small business

concern" under the Small Business Act. A "small business concern" is one which: (1) Is independently owned and operated; (2) is not dominant in its field of operation; and (3) satisfies any additional criteria established by the SBA.

117. Small Businesses. Nationwide, there are a total of approximately 29.6 million small businesses, according to the SBA.

118. Small Organizations. Nationwide, as of 2002, there are approximately 1.6 million small organizations. A "small organization" is generally "any not-for-profit enterprise which is independently owned and operated and is not dominant in its field."

119. Small Governmental Jurisdictions. The term "small governmental jurisdiction" is defined generally as "governments of cities, towns, townships, villages, school districts, or special districts, with a population of less than fifty thousand." Census Bureau data for 2002 indicate that there were 87,525 local governmental jurisdictions in the United States. The Commission estimates that, of this total, 84,377 entities were "small governmental jurisdictions." Thus, the Commission estimates that most governmental jurisdictions are small.

120. The Commission has included small incumbent local exchange carriers in this present RFA analysis. As noted above, a "small business" under the RFA is one that, inter alia, meets the pertinent small business size standard (*e.g.,* a telephone communications business having 1,500 or fewer employees), and "is not dominant in its field of operation." The SBA's Office of Advocacy contends that, for RFA purposes, small incumbent local exchange carriers are not dominant in their field of operation because any such dominance is not "national" in scope. The Commission has therefore included small incumbent local exchange carriers in this RFA analysis, although the Commission emphasizes that this RFA action has no effect on Commission analyses and determinations in other, non-RFA contexts.

121. Incumbent Local Exchange Carriers ("ILECs"). Neither the Commission nor the SBA has developed a small business size standard specifically for incumbent local exchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1,311 carriers have reported that they are engaged in the provision of incumbent local exchange services. Of these 1,311 carriers, an estimated 1,024 have 1,500 or fewer employees and 287 have more than 1,500 employees. Consequently, the Commission estimates that most providers of incumbent local exchange service are small businesses that may be affected by the proposed action.

122. Competitive Local Exchange Carriers ("CLECs"), Competitive Access Providers ("CAPs"), "Shared-Tenant Service Providers," and "Other Local Service Providers." Neither the Commission nor the SBA has developed a small business size standard specifically for these service providers. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 1005 carriers have reported that they are engaged in the provision of either competitive access provider services or competitive local exchange carrier services. Of these 1005 carriers, an estimated 918 have 1,500 or fewer employees and 87 have more than 1,500 employees. In addition, 16 carriers have reported that they are "Shared-Tenant Service Providers," and all 16 are estimated to have 1,500 or fewer employees. In addition, 89 carriers have reported that they are "Other Local Service Providers." Of the 89, all have 1,500 or fewer employees. Consequently, the Commission estimates that most providers of competitive local exchange service, competitive access providers, "Shared-Tenant Service Providers," and "Other Local Service Providers" are small entities that may be affected by the proposed action.

123. Interexchange Carriers ("IXCs"). Neither the Commission nor the SBA has developed a small business size standard specifically for providers of interexchange services. The appropriate size standard under SBA rules is for the category Wired Telecommunications Carriers. Under that size standard, such a business is small if it has 1,500 or fewer employees. According to Commission data, 300 carriers have reported that they are engaged in the provision of interexchange service. Of these, an estimated 268 have 1,500 or fewer employees and 32 have more than 1,500 employees. Consequently, the Commission estimates that the majority of IXCs are small entities that may be affected by the proposed action.

124. Satellite Telecommunications and All Other Telecommunications. These two economic census categories address the satellite industry. The first category has a small business size standard of $15 million or less in average annual receipts, under SBA rules. The second has a size standard of $25 million or less in annual receipts. The most current Census Bureau data in this context, however, are from the (last) economic census of 2002, and the Commission will use those figures to gauge the prevalence of small businesses in these categories.

125. The category of Satellite Telecommunications "comprises establishments primarily engaged in providing telecommunications services to other establishments in the telecommunications and broadcasting industries by forwarding and receiving communications signals via a system of satellites or reselling satellite telecommunications." For this category, Census Bureau data for 2002 show that there were a total of 371 firms that operated for the entire year. Of this total, 307 firms had annual receipts of under $10 million, and 26 firms had receipts of $10 million to $24,999,999. Consequently, the Commission estimates that the majority of Satellite Telecommunications firms are small entities that might be affected by the action.

126. The second category of All Other Telecommunications comprises, inter alia, "establishments primarily engaged in providing specialized telecommunications services, such as satellite tracking, communications telemetry, and radar station operation. This industry also includes establishments primarily engaged in providing satellite terminal stations and associated facilities connected with one or more terrestrial systems and capable of transmitting telecommunications to, and receiving telecommunications from, satellite systems." For this category, Census Bureau data for 2002 show that there were a total of 332 firms that operated for the entire year. Of this total, 303 firms had annual receipts of under $10 million and 15 firms had annual receipts of $10 million to $24,999,999. Consequently, the Commission estimates that the majority of All Other Telecommunications firms are small entities that might be affected by the action.

127. Wireless Telecommunications Carriers (except Satellite). Since 2007, the Census Bureau has placed wireless firms within this new, broad, economic census category. Prior to that time, such firms were within the now-superseded categories of "Paging" and "Cellular and Other Wireless Telecommunications." Under the present and prior categories, the SBA has deemed a wireless business

to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission will estimate small business prevalence using the prior categories and associated data. For the category of Paging, data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. For the category of Cellular and Other Wireless Telecommunications, data for 2002 show that there were 1,397 firms that operated for the entire year. Of this total, 1,378 firms had employment of 999 or fewer employees, and 19 firms had employment of 1,000 employees or more. Thus, the Commission estimates that the majority of wireless firms are small.

128. Common Carrier Paging. As noted, since 2007 the Census Bureau has placed paging providers within the broad economic census category of Wireless Telecommunications Carriers (except Satellite). Prior to that time, such firms were within the now-superseded category of "Paging." Under the present and prior categories, the SBA has deemed a wireless business to be small if it has 1,500 or fewer employees. Because Census Bureau data are not yet available for the new category, the Commission will estimate small business prevalence using the prior category and associated data. The data for 2002 show that there were 807 firms that operated for the entire year. Of this total, 804 firms had employment of 999 or fewer employees, and three firms had employment of 1,000 employees or more. Thus, the Commission estimates that the majority of paging firms are small.

129. In addition, in the Paging Second Report and Order, the Commission adopted a size standard for "small businesses" for purposes of determining their eligibility for special provisions such as bidding credits and installment payments. A small business is an entity that, together with its affiliates and controlling principals, has average gross revenues not exceeding $15 million for the preceding three years. The SBA has approved this definition. An initial auction of Metropolitan Economic Area ("MEA") licenses was conducted in the year 2000. Of the 2,499 licenses auctioned, 985 were sold. Fifty-seven companies claiming small business status won 440 licenses. A subsequent auction of MEA and Economic Area ("EA") licenses was held in the year 2001. Of the 15,514 licenses auctioned, 5,323 were sold. One hundred thirty-two companies claiming small business status purchased 3,724 licenses. A third auction, consisting of 8,874 licenses in each of 175 EAs and 1,328 licenses in all but three of the 51 MEAs, was held in 2003. Seventy-seven bidders claiming small or very small business status won 2,093 licenses.

130. Currently, there are approximately 74,000 Common Carrier Paging licenses. According to the most recent Trends in Telephone Service, 281 carriers reported that they were engaged in the provision of "paging and messaging" services. Of these, an estimated 279 have 1,500 or fewer employees and two have more than 1,500 employees. The Commission estimates that the majority of common carrier paging providers would qualify as small entities under the SBA definition.

131. Wireless Telephony. Wireless telephony includes cellular, personal communications services, and specialized mobile radio telephony carriers. As noted, the SBA has developed a small business size standard for Wireless Telecommunications Carriers (except Satellite). Under the SBA small business size standard, a business is small if it has 1,500 or fewer employees. According to Trends in Telephone Service data, 434 carriers reported that they were engaged in wireless telephony. Of these, an estimated 222 have 1,500 or fewer employees and 212 have more than 1,500 employees. The Commission has estimated that 222 of these are small under the SBA small business size standard.

132. Broadband Personal Communications Service. The broadband personal communications services ("PCS") spectrum is divided into six frequency blocks designated A through F, and the Commission has held auctions for each block. The Commission has created a small business size standard for Blocks C and F as an entity that has average gross revenues of less than $40 million in the three previous calendar years. For Block F, an additional small business size standard for "very small business" was added and is defined as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. These small business size standards, in the context of broadband PCS auctions, have been approved by the SBA. No small businesses within the SBA-approved small business size standards bid successfully for licenses in Blocks A and B. There were 90 winning bidders that qualified as small entities in the Block C auctions. A total of 93 "small" and "very small" business bidders won approximately 40 percent of the 1,479 licenses for Blocks D, E, and F. In 1999, the Commission reauctioned 155 C, D, E, and F Block licenses; there were 113 small business winning bidders.

133. In 2001, the Commission completed the auction of 422 C and F Broadband PCS licenses in Auction 35. Of the 35 winning bidders in this auction, 29 qualified as "small" or "very small" businesses. Subsequent events, concerning Auction 35, including judicial and agency determinations, resulted in a total of 163 C and F Block licenses being available for grant. In 2005, the Commission completed an auction of 188 C block licenses and 21 F block licenses in Auction 58. There were 24 winning bidders for 217 licenses. Of the 24 winning bidders, 16 claimed small business status and won 156 licenses. In 2007, the Commission completed an auction of 33 licenses in the A, C, and F Blocks in Auction 71. Of the 14 winning bidders, six were designated entities. In 2008, the Commission completed an auction of 20 Broadband PCS licenses in the C, D, E and F block licenses in Auction 78.

134. Advanced Wireless Services. In 2008, the Commission conducted the auction of Advanced Wireless Services ("AWS") licenses. This auction, which as designated as Auction 78, offered 35 licenses in the AWS 1710–1755 MHz and 2110–2155 MHz bands ("AWS–1"). The AWS–1 licenses were licenses for which there were no winning bids in Auction 66. That same year, the Commission completed Auction 78. A bidder with attributed average annual gross revenues that exceeded $15 million and did not exceed $40 million for the preceding three years ("small business") received a 15 percent discount on its winning bid. A bidder with attributed average annual gross revenues that did not exceed $15 million for the preceding three years ("very small business") received a 25 percent discount on its winning bid. A bidder that had combined total assets of less than $500 million and combined gross revenues of less than $125 million in each of the last two years qualified for entrepreneur status. Four winning bidders that identified themselves as very small businesses won 17 licenses. Three of the winning bidders that identified themselves as a small business won five licenses. Additionally, one other winning bidder that qualified for entrepreneur status won 2 licenses.

135. Narrowband Personal Communications Services. In 1994, the Commission conducted an auction for Narrowband PCS licenses. A second

auction was also conducted later in 1994. For purposes of the first two Narrowband PCS auctions, "small businesses" were entities with average gross revenues for the prior three calendar years of $40 million or less. Through these auctions, the Commission awarded a total of 41 licenses, 11 of which were obtained by four small businesses. To ensure meaningful participation by small business entities in future auctions, the Commission adopted a two-tiered small business size standard in the Narrowband PCS Second Report and Order. A "small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $40 million. A "very small business" is an entity that, together with affiliates and controlling interests, has average gross revenues for the three preceding years of not more than $15 million. The SBA has approved these small business size standards. A third auction was conducted in 2001. Here, five bidders won 317 (Metropolitan Trading Areas and nationwide) licenses. Three of these claimed status as a small or very small entity and won 311 licenses.

136. Cellular Radiotelephone Service. Auction 77 was held to resolve one group of mutually exclusive applications for Cellular Radiotelephone Service licenses for unserved areas in New Mexico. Bidding credits for designated entities were not available in Auction 77. In 2008, the Commission completed the closed auction of one unserved service area in the Cellular Radiotelephone Service, designated as Auction 77. Auction 77 concluded with one provisionally winning bid for the unserved area totaling $25,002.

137. Private Land Mobile Radio ("PLMR"). PLMR systems serve an essential role in a range of industrial, business, land transportation, and public safety activities. These radios are used by companies of all sizes operating in all U.S. business categories, and are often used in support of the licensee's primary (non-telecommunications) business operations. For the purpose of determining whether a licensee of a PLMR system is a small business as defined by the SBA, the Commission uses the broad census category, Wireless Telecommunications Carriers (except Satellite). This definition provides that a small entity is any such entity employing no more than 1,500 persons. The Commission does not require PLMR licensees to disclose information about number of employees, so the Commission does not have information that could be used to determine how many PLMR licensees constitute small entities under this definition. The Commission notes that PLMR licensees generally use the licensed facilities in support of other business activities, and therefore, it would also be helpful to assess PLMR licensees under the standards applied to the particular industry subsector to which the licensee belongs.

138. As of March 2010, there were 424,162 PLMR licensees operating 921,909 transmitters in the PLMR bands below 512 MHz. The Commission notes that any entity engaged in a commercial activity is eligible to hold a PLMR license, and that any revised rules in this context could therefore potentially impact small entities covering a great variety of industries.

139. Fixed Microwave Services. Fixed microwave services include common carrier, private operational-fixed, and broadcast auxiliary radio services. At present, there are approximately 22,015 common carrier fixed licensees and 61,670 private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services. The Commission has not created a size standard for a small business specifically with respect to fixed microwave services. For purposes of this analysis, the Commission uses the SBA small business size standard for the category Wireless Telecommunications Carriers (except Satellite), which is 1,500 or fewer employees. The Commission does not have data specifying the number of these licensees that have no more than 1,500 employees, and thus are unable at this time to estimate with greater precision the number of fixed microwave service licensees that would qualify as small business concerns under the SBA's small business size standard. Consequently, the Commission estimates that there are 22,015 or fewer common carrier fixed licensees and 61,670 or fewer private operational-fixed licensees and broadcast auxiliary radio licensees in the microwave services that may be small and may be affected by the rules and policies proposed herein. The Commission notes, however, that the common carrier microwave fixed licensee category includes some large entities.

140. Local Multipoint Distribution Service. Local Multipoint Distribution Service ("LMDS") is a fixed broadband point-to-multipoint microwave service that provides for two-way video telecommunications. The auction of the 986 LMDS licenses began and closed in 1998. The Commission established a small business size standard for LMDS licenses as an entity that has average gross revenues of less than $40 million in the three previous calendar years. An additional small business size standard for "very small business" was added as an entity that, together with its affiliates, has average gross revenues of not more than $15 million for the preceding three calendar years. The SBA has approved these small business size standards in the context of LMDS auctions. There were 93 winning bidders that qualified as small entities in the LMDS auctions. A total of 93 small and very small business bidders won approximately 277 A Block licenses and 387 B Block licenses. In 1999, the Commission re-auctioned 161 licenses; there were 32 small and very small businesses winning that won 119 licenses.

141. Rural Radiotelephone Service. The Commission has not adopted a size standard for small businesses specific to the Rural Radiotelephone Service. A significant subset of the Rural Radiotelephone Service is the Basic Exchange Telephone Radio System ("BETRS"). In the present context, the Commission will use the SBA's small business size standard applicable to Wireless Telecommunications Carriers (except Satellite), i.e., an entity employing no more than 1,500 persons. There are approximately 1,000 licensees in the Rural Radiotelephone Service, and the Commission estimates that there are 1,000 or fewer small entity licensees in the Rural Radiotelephone Service that may be affected by the rules and policies proposed herein.

142. Broadband Radio Service and Educational Broadband Service. Broadband Radio Service systems, previously referred to as Multipoint Distribution Service ("MDS") and Multichannel Multipoint Distribution Service ("MMDS") systems, and "wireless cable," transmit video programming to subscribers and provide two-way high speed data operations using the microwave frequencies of the Broadband Radio Service ("BRS") and Educational Broadband Service ("EBS") (previously referred to as the Instructional Television Fixed Service ("ITFS")). In connection with the 1996 BRS auction, the Commission established a small business size standard as an entity that had annual average gross revenues of no more than $40 million in the previous three calendar years. The BRS auctions resulted in 67 successful bidders obtaining licensing opportunities for 493 Basic Trading Areas ("BTAs"). Of the 67 auction winners, 61 met the definition of a small business. BRS also includes licensees of stations authorized prior to the auction. At this time, the Commission estimates that of the 61

small business BRS auction winners, 48 remain small business licensees. In addition to the 48 small businesses that hold BTA authorizations, there are approximately 392 incumbent BRS licensees that are considered small entities. After adding the number of small business auction licensees to the number of incumbent licensees not already counted, the Commission finds that there are currently approximately 440 BRS licensees that are defined as small businesses under either the SBA or the Commission's rules. In 2009, the Commission conducted Auction 86, the sale of 78 licenses in the BRS areas. The Commission offered three levels of bidding credits: (i) A bidder with attributed average annual gross revenues that exceed $15 million and do not exceed $40 million for the preceding three years (small business) will receive a 15 percent discount on its winning bid; (ii) a bidder with attributed average annual gross revenues that exceed $3 million and do not exceed $15 million for the preceding three years (very small business) will receive a 25 percent discount on its winning bid; and (iii) a bidder with attributed average annual gross revenues that do not exceed $3 million for the preceding three years (entrepreneur) will receive a 35 percent discount on its winning bid. Auction 86 concluded in 2009 with the sale of 61 licenses. Of the ten winning bidders, two bidders that claimed small business status won 4 licenses; one bidder that claimed very small business status won three licenses; and two bidders that claimed entrepreneur status won six licenses.

143. In addition, the SBA's Cable Television Distribution Services small business size standard is applicable to EBS. There are presently 2,032 EBS licensees. All but 100 of these licenses are held by educational institutions. Educational institutions are included in this analysis as small entities. Thus, the Commission estimates that at least 1,932 licensees are small businesses. Since 2007, Cable Television Distribution Services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services the Commission must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: All such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

144. Cable Television Distribution Services. Since 2007, these services have been defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: All such firms having 1,500 or fewer employees. To gauge small business prevalence for these cable services the Commission must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

145. Cable Companies and Systems. The Commission has also developed its own small business size standards, for the purpose of cable rate regulation. Under the Commission's rules, a "small cable company" is one serving 400,000 or fewer subscribers, nationwide. Industry data indicate that, of 1,076 cable operators nationwide, all but eleven are small under this size standard. In addition, under the Commission's rules, a "small system" is a cable system serving 15,000 or fewer subscribers. Industry data indicate that, of 6,635 systems nationwide, 5,802 systems have under 10,000 subscribers, and an additional 302 systems have 10,000–19,999 subscribers. Thus, under this second size standard, most cable systems are small.

146. Cable System Operators. The Communications Act of 1934, as amended, also contains a size standard for small cable system operators, which is "a cable operator that, directly or through an affiliate, serves in the aggregate fewer than 1 percent of all subscribers in the United States and is not affiliated with any entity or entities whose gross annual revenues in the aggregate exceed $250,000,000." The Commission has determined that an operator serving fewer than 677,000 subscribers shall be deemed a small operator, if its annual revenues, when combined with the total annual revenues of all its affiliates, do not exceed $250 million in the aggregate. Industry data indicate that, of 1,076 cable operators nationwide, all but ten are small under this size standard. The Commission notes that the Commission neither requests nor collects information on whether cable system operators are affiliated with entities whose gross annual revenues exceed $250 million, and therefore the Commission is unable to estimate more accurately the number of cable system operators that would qualify as small under this size standard.

147. Open Video Systems. The open video system ("OVS") framework was established in 1996, and is one of four statutorily recognized options for the provision of video programming services by local exchange carriers. The OVS framework provides opportunities for the distribution of video programming other than through cable systems. Because OVS operators provide subscription services, OVS falls within the SBA small business size standard covering cable services, which is "Wired Telecommunications Carriers." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for such services the Commission must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less

than $25 million. Thus, the majority of cable firms can be considered small. In addition, the Commission notes that the Commission has certified some OVS operators, with some now providing service. Broadband service providers ("BSPs") are currently the only significant holders of OVS certifications or local OVS franchises. The Commission does not have financial or employment information regarding the entities authorized to provide OVS, some of which may not yet be operational. Thus, again, at least some of the OVS operators may qualify as small entities.

148. Cable Television Relay Service. This service includes transmitters generally used to relay cable programming within cable television system distribution systems. This cable service is defined within the broad economic census category of Wired Telecommunications Carriers; that category is defined as follows: "This industry comprises establishments primarily engaged in operating and/or providing access to transmission facilities and infrastructure that they own and/or lease for the transmission of voice, data, text, sound, and video using wired telecommunications networks. Transmission facilities may be based on a single technology or a combination of technologies." The SBA has developed a small business size standard for this category, which is: all such firms having 1,500 or fewer employees. To gauge small business prevalence for cable services the Commission must, however, use current census data that are based on the previous category of Cable and Other Program Distribution and its associated size standard; that size standard was: all such firms having $13.5 million or less in annual receipts. According to Census Bureau data for 2002, there were a total of 1,191 firms in this previous category that operated for the entire year. Of this total, 1,087 firms had annual receipts of under $10 million, and 43 firms had receipts of $10 million or more but less than $25 million. Thus, the majority of these firms can be considered small.

149. Multichannel Video Distribution and Data Service. MVDDS is a terrestrial fixed microwave service operating in the 12.2–12.7 GHz band. The Commission adopted criteria for defining three groups of small businesses for purposes of determining their eligibility for special provisions such as bidding credits. It defined a very small business as an entity with average annual gross revenues not exceeding $3 million for the preceding three years; a small business as an entity with average annual gross revenues not exceeding $15 million for the preceding three years; and an entrepreneur as an entity with average annual gross revenues not exceeding $40 million for the preceding three years. These definitions were approved by the SBA. On January 27, 2004, the Commission completed an auction of 214 MVDDS licenses (Auction No. 53). In this auction, ten winning bidders won a total of 192 MVDDS licenses. Eight of the ten winning bidders claimed small business status and won 144 of the licenses. The Commission also held an auction of MVDDS licenses on December 7, 2005 (Auction 63). Of the three winning bidders who won 22 licenses, two winning bidders, winning 21 of the licenses, claimed small business status.

150. Internet Service Providers. The 2007 Economic Census places these firms, whose services might include voice over Internet protocol (VoIP), in either of two categories, depending on whether the service is provided over the provider's own telecommunications connections (*e.g.* cable and DSL, ISPs), or over client-supplied telecommunications connections (*e.g.* dial-up ISPs). The former are within the category of Wired Telecommunications Carriers, which has an SBA small business size standard of 1,500 or fewer employees. The latter are within the category of All Other Telecommunications, which has a size standard of annual receipts of $25 million or less. The most current Census Bureau data for all such firms, however, are the 2002 data for the previous census category called Internet Service Providers. That category had a small business size standard of $21 million or less in annual receipts, which was revised in late 2005 to $23 million. The 2002 data show that there were 2,529 such firms that operated for the entire year. Of those, 2,437 firms had annual receipts of under $10 million, and an additional 47 firms had receipts of between $10 million and $24,999,999. Consequently, the Commission estimates that the majority of ISP firms are small entities.

151. Electric Power Generation, Transmission and Distribution. The Census Bureau defines this category as follows: "This industry group comprises establishments primarily engaged in generating, transmitting, and/or distributing electric power. Establishments in this industry group may perform one or more of the following activities: (1) Operate generation facilities that produce electric energy; (2) operate transmission systems that convey the electricity from the generation facility to the distribution system; and (3) operate distribution systems that convey electric power received from the generation facility or the transmission system to the final consumer." This category includes Electric Power Distribution, Hydroelectric Power Generation, Fossil Fuel Power Generation, Nuclear Electric Power Generation, and Other Electric Power Generation. The SBA has developed a small business size standard for firms in this category: "A firm is small if, including its affiliates, it is primarily engaged in the generation, transmission, and/or distribution of electric energy for sale and its total electric output for the preceding fiscal year did not exceed 4 million megawatt hours." According to Census Bureau data for 2002, there were 1,644 firms in this category that operated for the entire year. Census data do not track electric output and the Commission has not determined how many of these firms fit the SBA size standard for small, with no more than 4 million megawatt hours of electric output. Consequently, the Commission estimates that 1,644 or fewer firms may be considered small under the SBA small business size standard.

152. Natural Gas Distribution. This economic census category comprises: "(1) establishments primarily engaged in operating gas distribution systems (*e.g.,* mains, meters); (2) establishments known as gas marketers that buy gas from the well and sell it to a distribution system; (3) establishments known as gas brokers or agents that arrange the sale of gas over gas distribution systems operated by others; and (4) establishments primarily engaged in transmitting and distributing gas to final consumers." The SBA has developed a small business size standard for this industry, which is: all such firms having 500 or fewer employees. According to Census Bureau data for 2002, there were 468 firms in this category that operated for the entire year. Of this total, 424 firms had employment of fewer than 500 employees, and 18 firms had employment of 500 to 999 employees. Thus, the majority of firms in this category can be considered small.

153. Water Supply and Irrigation Systems. This economic census category "comprises establishments primarily engaged in operating water treatment plants and/or operating water supply systems." The SBA has developed a small business size standard for this industry, which is: All such firms having $6.5 million or less in annual receipts. According to Census Bureau data for 2002, there were 3,830 firms in this category that operated for the entire year. Of this total, 3,757 firms had annual sales of less than $5 million, and

37 firms had sales of $5 million or more but less than $10 million. Thus, the majority of firms in this category can be considered small.

4. Description of Projected Reporting, Recordkeeping and Other Compliance Requirements

154. Should the Commission adopt the proposed regulations concerning access to poles, ducts, conduits, and rights-of-way, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping or other compliance requirements for pole owners and attaching entities. In particular, if the Commission adopts rules governing the timing of pole attachment preparation (i.e., survey and make-ready), as opposed to resolution on a case-specific complaint basis, reporting, recordkeeping or other compliance requirements could change. Examples of specific topics where recordkeeping, reporting, or compliance requirements could change by virtue of Commission action include: (1) Searches and surveys of both poles and conduits, including information management; (2) performance of make-ready work, including timeliness, safety, capacity, and the use of boxing and extension arms; and (3) the use of qualified third-party contract workers.

155. Should the Commission alter the enforcement process, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping, or other compliance requirements for pole owners and attaching entities. In particular, if the Commission eliminates the 30-day requirement in rule 1.404(m), a cable television operator or telecommunications carrier would no longer be required to file a complaint that it was denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f) within 30 days of the denial. If the Commission adopts a penalty regime for unauthorized attachments similar to Oregon's, pole owners might be required to notify occupiers of alleged violations, and to allow the occupiers an opportunity to correct violations or submit a plan for correction, before pursuing relief under the Commission's rules. If the Commission modifies the "sign and sue" rule, such action might require attachers to provide notice during contact negotiations of terms they consider unreasonable or discriminatory.

156. Should the Commission alter the pole attachment rate structure, such action could result in increased, reduced, or otherwise altered reporting, recordkeeping or other compliance requirements for pole owners and attaching entities. For example, if the Commission were to adopt a uniform rate for all pole attachments used for broadband Internet access service, providers of such services might be required to record and report where such service is offered. Changes to reporting, recordkeeping or other compliance requirements could either be new (*e.g.,* if telecommunications carriers begins to record or report where they offer broadband Internet access service) or could reconfigure existing requirements (*e.g.,* if cable television systems begin to record and report where they or their lessees offer broadband Internet access service, but cease to record and report where they or their lessees offer telecommunications services). If the Commission initiates regulation of the rates, terms, and conditions of pole attachment by incumbent LECs, such regulation could increase reporting, recordkeeping or other compliance requirements for pole owners and incumbent LECs where incumbent LECs attach to poles owned by other utilities.

5. Steps Taken To Minimize Significant Economic Impact on Small Entities, and Significant Alternatives Considered

157. The RFA requires an agency to describe any significant alternatives that it has considered in reaching its proposed approach, which may include (among others) the following four alternatives: (1) The establishment of differing compliance or reporting requirements or timetables that take into account the resources available to small entities; (2) the clarification, consolidation, or simplification of compliance or reporting requirements under the rule for small entities; (3) the use of performance, rather than design, standards; and (4) an exemption from coverage of the rule, or any part thereof, for small entities.

158. The Commission proposes to adopt a specific timeline and several additional rules that provide a predictable, timely process for parties to seek and obtain pole attachments, while maintaining a utility's interest in preserving safety, reliability, and sound engineering. In the consideration of these proposals, the Commission seeks comment on whether adjustments based on the size of the utility to which the timeline applies are warranted. For instance, the Commission asks whether small utilities should negotiate all timelines individually or have the option of adjusting the timeline based on the size of the attachment request, and whether steps taken to improve the availability of pole data could potentially burden small pole owners. Further, the Commission does not have authority to regulate (and the proposed rules, thus, do not apply to) small utilities that are municipally or cooperatively owned.

159. The Commission also proposes to modify its rules to ensure that its enforcement process is suited to resolving access-related complaints and is fair to all parties. In particular, the Commission proposes to remove the 30-day requirement to file a complaint from § 1.404(m), amend § 1.1410 to enumerate the remedies available to an attacher and provide for compensatory damages, and amend § 1.404(d) to require an attacher to object in writing, during contract negotiations, to provisions it considers unreasonable or discriminatory. These modifications aim to streamline the complaint process and remove barriers to informal dispute resolution, and they should have minimal, if any, economic impact on small entities.

160. Finally, the Commission proposes to promote broadband deployment and competition by reinterpreting the section 224(e) telecom rate in a way that yields pole rental rates that are as low and close to uniform as possible. The Commission considered requiring all categories of providers to pay a uniform rate that would have been higher than the cable rate but lower than the telecom rate, but found that pursuing uniformity by increasing cable operators' pole rental rates would come at the cost of increased broadband prices and reduced incentives for deployment. The Commission also seeks comment on alternative proposals that would establish a uniform rate for all pole attachments used to provide broadband, and on whether the rates paid by incumbent LEC attachers should also be subject to the "just and reasonable" rates provision in section 224(b).

6. Federal Rules That May Duplicate, Overlap, or Conflict With the Proposed Rules

161. None.

Ordering Clauses

162. Accordingly, *It is ordered* that pursuant to sections 1, 4(i), 4(j), 224, 251(b)(4), and 303 of the Communications Act of 1934, as amended, 47 U.S.C. 151, 154(i)–(j), 224, 251(b)(4), 303, this Order and Further Notice of Proposed Rulemaking in WC Docket No. 07–245 *is adopted.*

163. *It is further ordered* that the Commission's Consumer and Governmental Affairs Bureau, Reference Information Center, shall send a copy of

this further notice, including the Initial Regulatory Flexibility Analysis, to the Chief Counsel for Advocacy of the Small Business Administration.

List of Subjects in 47 CFR Part 1

Administrative practice and procedure, Cable television, Communications common carriers, Communications equipment, Telecommunications, Telephone, Television.

Federal Communications Commission.

Marlene H. Dortch,

Secretary.

Proposed Rules

For the reasons discussed in the preamble, the Federal Communications Commission proposes to amend 47 CFR part 1 as follows:

PART 1—PRACTICE AND PROCEDURE

Subpart J—Pole Attachment Procedures

1. The heading of Part 1, subpart J is amended to read as set forth above.

2. The authority citation for part 1, subpart J is added to read as follows:

Authority: 47 U.S.C. 224, 154(i).

3. Section 1.1402 is amended by adding paragraph (o) to read as follows:

§ 1.1402 Definitions.

* * * * *

(o) The term *authorized contractor* means an independent contractor that is approved by a utility and is certified by the utility to perform field surveys, engineering analyses, or make-ready work, and includes any contractor that the utility itself employs to perform such work.

4. Section 1.1403 is amended by revising paragraph (b) to read as follows:

§ 1.1403 Duty to provide access; modifications; notice of removal, increase or modification; petition for temporary stay; and cable operator notice.

* * * * *

(b) Requests for access to a utility's poles, ducts, conduits, or rights-of-way by a telecommunications carrier or cable operator must be in writing. If access is not granted within 45 days of the request for access, the utility must explain the denial or grant of access conditioned on performance of make-ready in writing by the 45th day. The utility's explanation shall be specific, shall include all relevant evidence and information supporting its decision and shall explain how such evidence and information relate to a denial or conditional grant of access for reasons of lack of capacity, safety, reliability or engineering standards.

* * * * *

5. Section 1.1404 is amended by revising paragraphs (d) and (m) to read as follows:

§ 1.1404 Complaint.

* * * * *

(d) The complaint shall be accompanied by a copy of the pole attachment agreement, if any, between the cable system operator or telecommunications carrier and the utility. If the complainant contends that a rate, term, or condition in an executed pole attachment agreement is unjust and unreasonable, it shall attach to its complaint evidence documenting that the complainant provided written notice to the respondent, during negotiation of the agreement, that the complainant considered the rate, term, or condition unjust and unreasonable, and the basis for that conclusion. Proof of such notice to the respondent shall be a prerequisite to filing a complaint challenging a rate, term, or condition in an executed agreement, except where the complainant establishes that the rate, term, or condition was not unjust and unreasonable on its face, but only as applied by the respondent, and it could not reasonably have anticipated that the challenged rate, term, or condition would be applied or interpreted in such an unjust and unreasonable manner. If there is no present pole attachment agreement, the complaint shall contain:

(1) A statement that the utility uses or controls poles, ducts, or conduits used or designated, in whole or in part, for wire communication; and

(2) A statement that the cable television system operator or telecommunications carrier currently has attachments on the poles, ducts, conduits, or rights-of-way.

* * * * *

(m) In a case where a cable television system operator or telecommunications carrier claims that it has been denied access to a pole, duct, conduit or right-of-way despite a request made pursuant to section 47 U.S.C. 224(f), the complaint, in addition to meeting the other requirements of this section, shall include the data and information necessary to support the claim, including:

(1) The reasons given for the denial of access to the utility's poles, ducts, conduits and rights-of-way;

(2) The basis for the complainant's claim that the denial of access is improper;

(3) The remedy sought by the complainant;

(4) A copy of the written request to the utility for access to its poles, ducts, conduits or rights-of-way; and

(5) A copy of the utility's response to the written request including all information given by the utility to support its denial of access. A complaint alleging improper denial of access will not be dismissed if the complainant is unable to obtain a utility's written response, or if the utility denies the complainant any other information needed to establish a prima facie case.

6. Section 1.1409 is amended by revising paragraph (e)(2) to read as follows:

§ 1.1409 Commission consideration of the complaint.

* * * * *

(e) * * *

(2) With respect to attachments to poles by any telecommunications carrier or cable operator providing telecommunications services, the maximum just and reasonable rate shall be the higher of:

(i) The rate yielded by § 1.1409(e)(1), or

(ii) The rate yielded by the following formula:

Maximum Rate = Space Factor × Net Cost of a Bare Pole × [Carrying Charge Rate]

Where

Space Factor = [(Space Occupied) + [(⅔) × (Unusable Space/No. of Attaching Entities)]]/Pole Height

* * * * *

7. Section 1.1410 is revised to read as follows:

§ 1.1410 Remedies.

(a) If the Commission determines that the rate, term, or condition complained of is not just and reasonable, it may prescribe a just and reasonable rate, term, or condition and may:

(1) Terminate the unjust and unreasonable rate, term, or condition;

(2) Substitute in the pole attachment agreement the just and reasonable rate, term, or condition established by the Commission;

(3) Order a refund, or payment, if appropriate. The refund or payment will normally be the difference between the amount paid under the unjust and/or unreasonable rate, term, or condition and the amount that would have been paid under the rate, term, or condition established by the Commission, plus interest, consistent with the applicable statute of limitations; and

(4) Order an award of compensatory damages, consistent with the applicable statute of limitations.

(b) If the Commission determines that access to a pole, duct, conduit, or right-of-way has been unlawfully denied or unreasonably delayed, it may:

(1) Order that access be permitted within a specified time frame and in accordance with specified rates, terms and conditions; and

(2) Order an award of compensatory damages, consistent with the applicable statute of limitations.

8. Add § 1.1420 to subpart J to read as follows:

§ 1.1420 Timeline for access to poles, ducts, conduits, and rights-of-way.

(a) All time limits in this section are to be calculated according to § 1.4.

(b) A request for access triggers a requirement to perform the obligations in § 1.1403(b) within 45 days, including a survey and engineering analysis used to support a utility's decision. If the utility fails to complete and deliver the survey to the requesting entity within 45 days after the request, the requesting entity may use a contractor to complete the survey and engineering analysis. The utility shall cooperate with the requesting entity in directing and supervising the authorized contractor.

(1) For poles, ducts, conduits, and rights-of-way owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks.

(2) For poles, ducts, conduits, and rights-of-way owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.

(c) Within 14 days of providing a survey as required by § 1.1420(b), a utility shall tender an offer to perform all necessary make-ready work, including an estimate of its charges.

(1) The requesting entity may accept a valid offer and make an initial payment upon receipt, or until the offer is withdrawn.

(2) The utility may withdraw an outstanding offer to perform make-ready work after 14 days.

(d) Upon receipt of payment, a utility shall notify immediately all attaching entities that may be affected by the project, and shall specify the date after which the utility or its agents become entitled to move the facilities of the attaching entity.

(1) The utility shall set a date for completion of make-ready no later than 45 days after the notice.

(2) The utility shall direct and coordinate the sequence and timing of rearrangement of facilities to afford each attaching entity a reasonable opportunity to use its own personnel to move its facilities.

(3) Completion of all make-ready work and final payment by the requesting entity shall complete the grant of requested access and all necessary authorization.

(e) If make-ready work is not completed by any other attaching entities as required by paragraph (d) of this section, the utility or its agent shall complete all necessary make-ready work.

(1) An incumbent local exchange carrier's facilities may be rearranged or replaced by the utility or its agents 45 days after the notice required in paragraph (d) of this section.

(2) A cable system operator's or telecommunications carrier's remaining facilities may be rearranged or replaced by the utility or its agents 60 days after the notice required by paragraph (d) of this section.

(f) If make-ready work is not completed in the time specified in paragraph (e)(2) of this section, the requesting entity may use a contractor to complete all necessary make-ready work. For poles owned by an incumbent LEC utility, the requesting entity shall use a contractor that has at least the same qualifications and training as the incumbent LEC's own workers that perform the same tasks. For poles owned by a non-incumbent LEC utility, the requesting entity shall use an authorized contractor.

(1) The utility shall cooperate with the requesting entity in directing and supervising the contractor.

(2) Upon completion of make-ready, the requesting entity shall pay the utility for any outstanding expenses charged by the utility for expenses incurred to complete the make-ready.

(3) Upon receipt of payment or establishment that no further payment is due, the utility shall confirm that the request for access is granted.

(4) Once all make-ready work is performed and the request for access is granted, the requesting entity may use any contractor to install its facilities that has the same qualifications, in terms of training, as the utility's own workers, whether or not the contractor is authorized by the utility.

9. Add § 1.1422 to subpart J to read as follows:

§ 1.1422 Contractors.

(a) Utilities shall make available:

(1) A list of authorized contractors; and

(2) Criteria and procedures for becoming an authorized contractor.

(b) If a contractor has been hired according to conditions specified in § 1.1420, a utility may direct and supervise an authorized contractor in cooperation with the requesting entity.

(1) The attaching entity shall invite a utility representative to accompany the contractor and the utility representative may consult with the authorized contractor and the entity requesting access.

(2) The representative of a non-incumbent LEC utility may make final determinations on a nondiscriminatory basis that relate directly to insufficient capacity or the safety, reliability, and sound engineering of the infrastructure.

10. Add § 1.1424 to subpart J to read as follows:

§ 1.1424 Exclusion from work among the electric lines.

(a) Utilities may exclude non-utility personnel from working among the electric lines on a utility pole, except workers with specialized communications-equipment skills or training that the utility cannot duplicate which are necessary to add or maintain a pole attachment.

(b) Utilities shall permit workers with specialized skills or training concerning communications equipment to work among the electric lines:

(1) In concert with the utility's workforce; and

(2) When the utility deems it safe.

11. Add § 1.1426 to subpart J to read as follows:

§ 1.1426 Charges for access and make-ready.

(a) Utilities shall make available to attaching entities a schedule of common make-ready charges.

(b) Payment for make-ready charges is due in the following increments:

(1) Payment of 50 percent of estimated charges requires the recipient utility to begin make-ready performance.

(2) Payment of 25 percent of estimated charges is due 22 days after the first payment.

(3) Payment of remaining make-ready charges is due when access is granted.

12. Add § 1.1428 to subpart J to read as follows:

§ 1.1428 Administration of pole attachment requests.

(a) Where a pole is jointly owned by more than one utility:

(1) The owners shall designate a single owner to manage requests for pole attachment; and

(2) Each owner shall make publicly available the identity of the managing utility for its poles.

(b) Requesting entities shall not be required to interact with an owner other than the single managing pole owner.

(c) The managing pole owner shall:

(1) Collect from each existing attacher a statement of any costs attributable to rearrangement of the existing attacher's facilities to accommodate a new attacher.

(2) Bill the new attacher for these costs, plus any expenses the managing pole owner incurs in its role as clearinghouse; and

(3) Disburse compensatory payment to the existing attachers.

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